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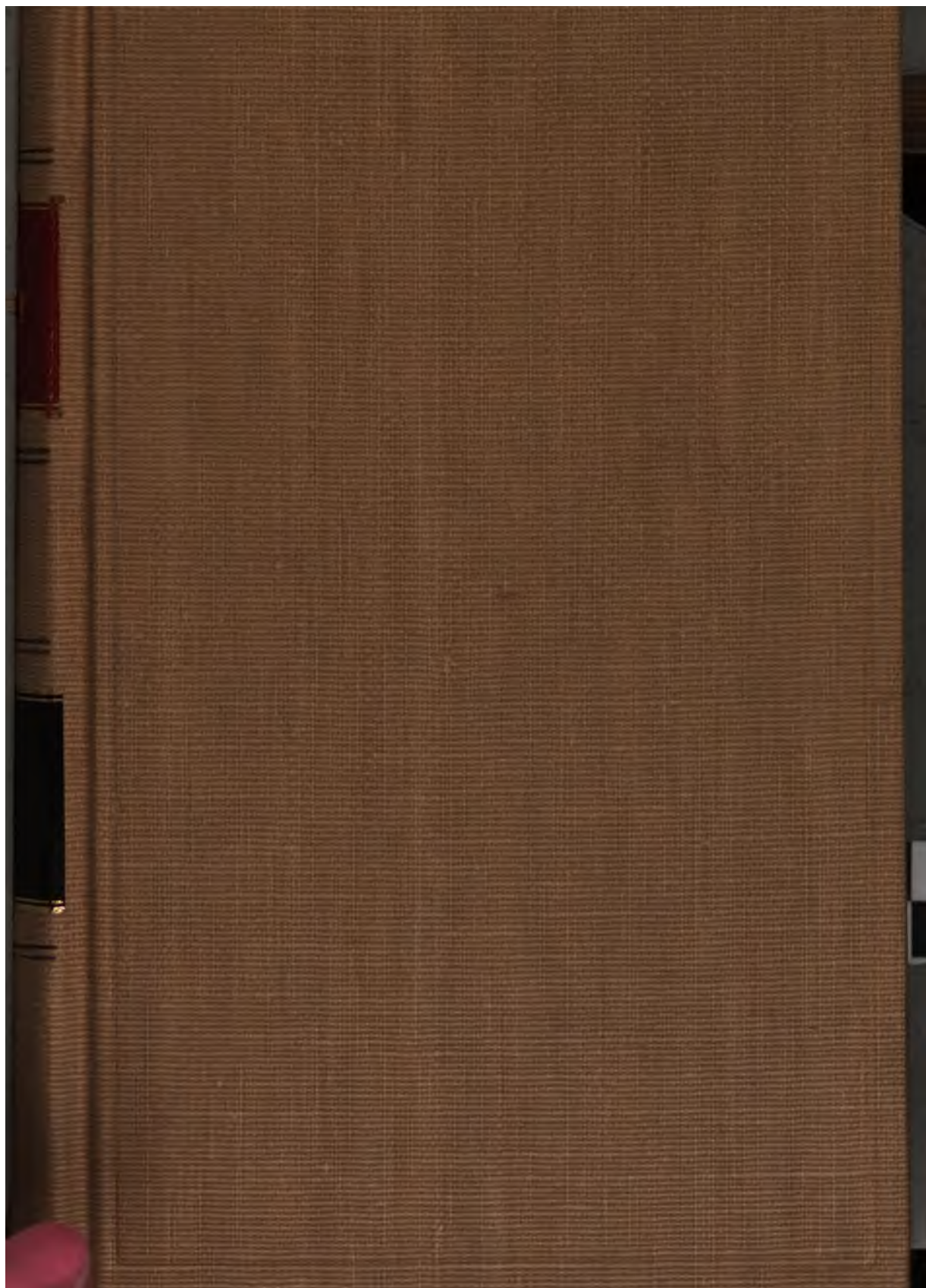
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FOREWORD

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE SUPERIOR COURT OF INDIANA
BY OLIVER M. WILSON, OFFICIAL REPORTER
WITH
COLLECTION OF AUTHORITIES CITED TO CASES
VOLUME 1, INDIANAPOLIS
1875

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
AT
INDIANAPOLIS

WITH COLLECTION OF AUTHORITIES CITED TO CASES.

VOL. I.

By OLIVER M. WILSON,
OFFICIAL REPORTER.

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1875.



JUDGES SUPERIOR COURT.

HON. SOLOMON BLAIR.*

Term expired October 9, 1872. Re-elected October 9, 1872.
Term expires October 9, 1876.

HON. HORATIO C. NEWCOMB.*

Term expired October 9, 1874. Re-elected October 9, 1874.
Term expires October, 1878.

HON. FREDERICK RAND.*

Term expires October, 1874. Resigned August, 1872.

HON. SAMUEL E. PERKINS.

Appointed successor to Judge Rand, August, 1872. Term expired Oct., 1874.
Elected October, 1874. Term expires October, 1878.

*Appointed by the Governor February 25, 1871, under the act establishing the Superior Court, approved February 15, 1871.



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RULES
ADOPTED BY THE
SUPERIOR COURT
OF
MARION COUNTY, INDIANA,

AT THE MAY TERM, 1871.

GENERAL TERM.

1. On the first day of each regular term, the Judges shall meet in General Term, and distribute the causes on the General Term Docket, to the Special Terms, to be held by each of the Judges; and they may also, at any time, make any re-distribution that may be proper.

2. The Court in general session, on the first day of each regular term, may adjourn the General Term from day to day, or from time to time, as the Court may designate; and the last Monday of each regular term, and so much of that week as may be necessary, shall be devoted to disposing of appeals from the Special Terms; and by leave of the Court in General Term, appeals may be heard at other times.

SPECIAL TERMS.

3. The business in Special Terms shall be transacted in three different rooms, and one Judge shall be assigned to transact the business in each room. Such assignment of Judges shall be made on the first day of each regular term. The rooms in which said Special Terms shall be held, shall be designated and known as Superior Court Room No. 1; Superior Court Room No. 2; Superior Court Room No. 3. Whenever the Judge assigned to any room is absent, or cannot, for any reason, hear any cause pending in his room, either of the other Judges may preside in such room, and hear any cause on the docket of that room, and for such purpose, the Judge so presiding, shall be considered and held to be assigned to transact the business of that room.

4. On the Tuesday succeeding the first Monday of each regular term, each Judge shall open a Special Term of Court in the room to which he has been assigned, and call the docket from day to day, and transact the business of the Special Term. This rule shall not be so construed as to prevent each Judge from opening and holding a Special Term on the first day of each regular term to try causes, hear and determine motions and such matters as may be legally presented on that day.

CAUSES AT ISSUE.

5. As soon as the issues are formed in a cause pending in this Court, the parties are required to elect whether the cause is to be tried by the Court or by a jury; and upon failure for two days after the closing of the issues to announce such election to the Court, the parties shall be deemed to have elected to try such cause by the Court, and in either case the election shall be entered of record in the cause.

APPEALS TO GENERAL TERMS.

6. When a party appeals from Special to General Term, such appeal shall not be perfected and shall not operate as a supersedeas of the judgment until either a bond is filed or the appellant shall file an abstract of the record from the Entry Docket, and a written or printed assignment of the errors or points relied upon for the reversal of the cause; and the Clerk shall not enter appeal cases on the Appeal Docket until such abstract of the record, and such statement of the errors or points relied upon for reversal, are filed. This rule shall apply to cross errors.

7. If no such statement and abstract, as are provided for in Rule No. 6, are filed on or before the second term after the appeal is taken, the appeal shall be deemed abandoned.

CLERK.

8. It shall be the duty of the Clerk to be in attendance on the Court, in person or by deputy, promptly at the hour of meeting, and remain in attendance during the sessions of the Court.

9. The Clerk shall keep an Entry Docket in his office, in which all suits shall be entered at the time and in the order in which they are brought—the suits to be numbered in their order as filed; the docket to show the full names of all parties and the date of filing of each suit; the kind and date of process issued, and all proceedings had by the Court subsequently therein.

10. The Clerk shall keep an Issue Docket, and prepare a Court Docket for the Judge, for each room, upon which he shall enter all causes which have been assigned at General Term to such room—such dockets to be prepared in time for business at Special Terms.

11. The Clerk shall keep an Order Book, in which he shall record at large all proceedings of the Court in General Term. The Clerk shall also

keep an Order Book for each room, in which he shall enter at large all motions, orders, defaults, judgments, decrees, and other proceedings at Special Term, in the respective rooms.

12. The names of the parties must be entered on the Issue Docket, and on the minutes, without abbreviation; but after naming three on each side, others may be designated by the words, "and others," except in final entries.

13. The Clerk shall keep Judgment Dockets, in which he shall enter all judgments rendered in General or Special Terms, according to their date, in the manner provided for by law for docketing judgments in the Circuit Court. Said entries shall also show the number of the case on the Entry Docket.

14. The Clerk shall also keep the necessary Execution Dockets, Fee Books, and Complete Records, in the manner provided by law for such dockets and records in the Circuit Court.

15. The Clerk shall furnish, at the expense of the county, for the use of attorneys, at each regular term, printed dockets containing all pending causes filed ten days before the term.

SHERIFF AND BAILIFF.

16. The Sheriff, in person or by deputy, or the Bailiff appointed by the Court, shall be present promptly at the hour of meeting, and remain in attendance during all the sessions of the Court. It shall be his duty to preserve silence and order in the court room, and promptly report to the Court the names of any and all persons who, after his request, shall fail or refuse to comply with the same.

17. The Sheriff's docket must be at all times in court, and must show the causes and their numbers, the date of every service of process, and the names of witnesses, designating those who have been served, and those not found.

ATTORNEYS.

18. Attorneys of other courts will be admitted to practice on motion by an Attorney of the Court. Other persons will be admitted on such motion made in writing, supported by an affidavit showing that the applicant is a voter of the State of Indiana, and a person of good moral character, which motion must be seconded by another Attorney of the court, vouching for the good moral character of the applicant. Upon the admission of any Attorney, his name, with the date of his admission, the names of the Attorney on whose motion he is admitted, and of the Attorney vouching for his character, shall be entered on the Order Book by the Clerk.

19. Attorneys sworn in either General or Special Term, shall be permitted to practice in General or Special Terms without being re-sworn.

20. An Attorney will not be required to produce and prove his authority for appearance, except upon notice and motion, supported by affidavit showing reasonable cause therefor. This shall be the practice on all motions against Attorneys relative to their official duties.

21. No appearance by Attorney in actions for divorce, where personal service of process has not been made, will be recognized, unless written consent of the party is filed, and the execution thereof shown by satisfactory evidence.

22. No motion of an Attorney will be recognized unless it is made in an audible voice by the Attorney, in his place, and within hearing of other members of the Bar.

23. Whenever Attorneys shall, on or before the first day of any regular term, enter their names for any defendants, specifying which ones, in the Entry Docket, that, shall be deemed an appearance for such defendants, and on the calling of such case, in Special Term, a rule shall be taken against such defendants to answer, instead of a default.

24. But one Attorney on each side can examine or cross-examine the same witness.

MOTIONS.

25. After the minutes are read the Bar will be called for motions, except when a trial is in progress. Motions may also be made in any cause when called in its order. But one Attorney will be heard for a motion, one against it, and the mover in reply, except by leave of court.

26. Motions for new trials, in arrest of judgment, to strike out, or reject pleadings, or parts of depositions, must be in writing, must state the reason, and must be properly filed. The party moving begins and closes the argument.

27. When a motion requires notice, and the time is not otherwise fixed, one day's notice is sufficient, in term time, in a cause upon the docket. Notice of motion must be in writing, and must state briefly on what the motion will be founded. If founded on facts not admitted, or not apparent, the facts must be shown by affidavit. Where a party is present in court in person, or by Attorney, no written notice of motion shall be necessary.

28. Under section 305 of the practice act, if the possession of the paper or document be admitted or apparent, the motion for order to produce it may be upon notice alone; otherwise, it must be upon affidavit showing the possession, and upon proof of service of notice.

29. A motion to be made a party to a pending suit under sections 18 and 22 of the practice act, must be upon petition, under oath, showing cause, and upon notice.

30. All motions as to taxation of costs must be in writing, and speci-

fully set forth the reasons, and the proposed mode of taxing the same, and upon notice.

81. The court will at any time before trial, on suggestion of the Clerk, require a non-resident plaintiff to file an undertaking for costs. The defendant may, at any time, move for security for costs. The non-residence, unless apparent or admitted, must be shown by affidavit.

82. A motion to reject a sham defense must be supported by affidavit, and be upon notice, unless in answer to interrogatories, or otherwise the defendant admits he has no defense, or unless he fails to answer interrogatories in response to a rule. The motion will not be granted if the defendant files an affidavit that his defense is true.

83. All motions and applications for a change of venue must be made and filed one day prior to the day on which the cause is called for trial, or within one day after the issues are closed.

CONTINUANCES.

84. After a cause is called for trial, time will not be given to prepare an affidavit for continuance for any cause known to the party, or his Attorney, prior to the call of the cause.

85. When time has been given to prepare an affidavit for continuance, and the affidavit is not made, or, if made, is held insufficient, the adverse party may, at his option, insist on a trial, or a continuance at the costs of the party to whom time has been given.

86. When a cause has remained upon the docket for the two preceding terms of court (except proceedings in partition, or when awaiting reports of commissioners or receivers,) it shall only be continued upon motion and affidavit filed, showing good cause for continuance.

87. There can be no argument upon a motion to continue, and no contradictory or supplemental affidavit can be considered.

MISCELLANEOUS.

88. All books and records shall be plainly marked and numbered so as to plainly indicate to what Court, Term and Room, they respectively belong.

89. Parties to suits pending in this court may take, and by this rule are granted leave to take, depositions during term time, to be read in evidence on the trials of said causes, upon giving the opposite parties such notice of the time and place of taking the same, as is now required for taking depositions in vacation.

40. Whenever a cause shall be filed during the term in which any immediate action is required to be had by the court, said cause shall be at once assigned to the room to which, in its regular order, it should be

assigned; and the Clerk shall place the same upon the Court Docket of the room to which such cause has been assigned.

41. Admissions or agreements about the proceedings in a cause will not be enforced, or the time of the court permitted to be used in discussing them, unless in writing or made of record, or in presence of the court.

42. No bill of exceptions containing the evidence in the cause will be signed or examined by the Judge, unless it is first exhibited to the opposing counsel for examination.

48. If any person shall ask the Sheriff or a bailiff to place him upon a jury, it shall be considered a contempt of court, on the part of the Sheriff or bailiff, if he shall put such person on the jury.

Superior Court Reports.

IN GENERAL TERM, 1871.

JOHN C. BALDWIN, Appellee, v. GEORGE BIERSDORFER, ET AL., Appellants.

Appealed from BLAIR, Judge.

*Assault and Battery—Aiding and Abetting—Conspiracy—
New Trial.*

Liability for *assault*, extends not only to persons committing the act, but as well to those who are present, and encourage either its commission, or its continuance.

Presence at the commission of an offense, and encouragement either by words, signs, or gestures, or being sufficiently near, in pursuance of an agreement to assist, is *aiding and abetting* in the commission of the wrongful act.

Where the evidence discloses the presence of others in a situation to render aid, the jury may determine whether such persons were not there for the purpose connected with the assault, and from such circumstances and facts, they may properly infer the formation of a *conspiracy* for its commission.

A *new trial* will not be granted because of newly discovered evidence, where it is *cumulative*, or to impeach a witness; nor for newly discovered evidence, not cumulative, if such evidence would not probably produce a different result on a new trial; nor where in support of motion for new trial, is shown a manifest lack of diligence in obtaining the evidence upon which the motion is based.

James E. Heller and W. W. Leathers, for appellants.

Test, Burns & Wright, for appellee.

Baldwin v. Biersdorfer et al.

RAND, J.—This was a suit by John C. Baldwin against Charles Wridt and six others for an alleged assault and battery upon him.

The case was tried at Special Term, and there was a verdict and judgment over motion for new trial, against all the defendants (except Hugh, as to whom plaintiff dismissed) for \$1,000, and the defendants Biersdorfer, Bruner and Koerner appeal to General Term, and seek a reversal of the judgment against them.

The appellants urge two grounds for a reversal of the cause—

1. That the Court erred in its charge to the jury.
2. That the verdict is contrary to the evidence.
3. And Biersdorfer and Koerner further urge that a new trial should have been granted them on the grounds of newly discovered evidence.

The evidence is in the record, and proper exceptions were taken at the time.

First—Did the Court err in its charge to the jury?

The charge complained of is as follows:

1. If you find from the evidence that any one or more of the defendants assaulted the plaintiff, and by beating, striking or kicking him, inflicted any injury upon his person, the plaintiff will be entitled to recover; and if you find that the plaintiff was assaulted and injured by any one or more of the defendants, and others of the defendants were present, aiding or abetting in the commission of the assault, or its continuance after it had been commenced, the plaintiff will be entitled to recover against the person so engaged in the assault, as well as against those so aiding and abetting.

2. By the terms aiding and abetting is meant those who are present at the commission of the injury, and who, by words, signs or gestures encouraged the perpetration of the wrongful act; or who assist and co-operate in the commission of the same; or being present or near at hand in pursuance

Baldwin v. Biersdorfer et al.

of a previous agreement with the person or persons making the assault, ready to assist in the commission of the wrongful act, if the same should become necessary.

It is admitted in argument that the above charge is a correct exposition of the law in a proper case, but it is urged that there was no proof of a conspiracy, and that hence the charge misled the jury.

We have carefully examined the evidence, and whilst we find no positive evidence of a conspiracy, yet there were facts and circumstances proven before the jury, from which they might properly infer such a conspiracy; and we conclude there was no error in the charge.

Second—Is the verdict of the jury contrary to the evidence?

There was evidence before the jury tending to show that each of the appellants participated in the assault upon plaintiff, and whilst we find evidence tending to the contrary, there was no such want of evidence to sustain the verdict as to call upon us to reverse the case. The facts were properly submitted to the jury, and according to well established principles we should not interfere with the verdict.

Third—Did the Court err in overruling the motion for a new trial, as to Biersdorfer, and Koerner, because of newly discovered evidence?

It is a well settled principle of law, that a new trial should not be granted because of newly discovered evidence, when it is *cumulative*, or to impeach a witness, nor for newly discovered evidence, not *cumulative*, if such evidence *would not produce a different result* on a new trial.

All the affidavits on the part of Koerner, and all but three on the part of Biersdorfer are merely *cumulative*, and therefore no new trial should be granted on account of such newly discovered cumulative evidence. See *Fox v. Reynolds*, 24 Ind., 46, and *Jackson v. Sharpe Adm'r*, 29 Ind., 167.

Biersdorfer on the trial attempted to prove an *alibi*, and his newly discovered cumulative evidence is for the purpose of

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more clearly proving the *alibi*. The affidavit of one Myers is filed, who says that he was in the employ of Biersdorfer, in his saloon, on the 31st of January, 1871, and that Biersdorfer was with him from 5 o'clock P. M. until 11 o'clock P. M. of that day. If Biersdorfer in good faith relied upon an *alibi*, it seems to us that the very first thing he would have done on the trial would have been to have introduced the witness he *knew* was engaged with him in the saloon during the difficulty in which he was sought to be implicated, and who could have established his defence. He knew before the trial that they were employed together, and that Myers could prove his *alibi*, if such was the fact, and did not need to wait until Myers should communicate the information to him. It throws a suspicion over his defence. Such work of dilligence should not be encouraged, and if Myers' evidence was not *cumulative*, there is such a manifest lack of diligence that a new trial should not be granted for that reason.

It is urged for Biersdorfer, that the affidavits of Enos B. Chives, Thomas F. Brown and H. S. Stumph are not entirely cumulative.

The portion of Chives' affidavit relied upon as not *cumulative*, is as follows.: "That plaintiff replied that the defendant, George Biersdorfer, was good—that he was worth about \$3,000, and that he would have to be responsible for the balance, meaning the other defendants in said suit: that he, said plaintiff, had nothing against said defendant Biersdorfer."

Brown swears, "Said plaintiff further said that said Biersdorfer had about \$3,000 in property, and he would hold him for that." "Stumph swears that plaintiff told him that he had nothing against said Biersdorfer."

Now it seems from these affidavits that these statements were made after plaintiff had sued Biersdorfer as one of the parties who made the assault upon him. What did plaintiff mean when he said he had nothing against Biersdorfer?

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Did he mean he had no cause of action against Biersdorfer? Or did he mean he had no malice, or ill will against him? If he meant the former, then we admit the evidence would be very important, but if the latter, it would hardly be worth consideration.

He had sued Biersdorfer, and said he was relying on his solvency to make any judgment he might recover against defendants, and it would be unreasonable to construe his language that he had no cause of action against Biersdorfer; and without that construction it is unimportant.

The further statement that Biersdorfer was worth \$3,000, and he would have to be responsible for the other defendants, is not of such importance as to justify the Court in believing that it would give such preponderance in favor of Biersdorfer as that a new trial would result in his favor. He simply stated a correct proposition of law, if Biersdorfer was guilty, and his statement is not entitled to such legal consequences.

The judgment of the Special Term is affirmed.

NOTE.—If a conspiracy be proved, and a presence, in a situation to render aid, it is a *legal presumption* that such presence was with a view to render aid, and it lies on the party to rebut it by showing that he was there for a purpose unconnected with the conspiracy. 9 *Pick.*, 496. See also 1 *Cr. C. C.*, 164.

The jury may consider from the evidence whether the defendant was engaged in the alleged conspiracy, and had combined with others for the same illegal purpose. 10 *Pick.*, 497, and see *Roscoe Crim. Ev.*, 6th *Am. Ed.*, Note 1, on page 88.

Contra in felony, where it is necessary, in order to make him an aider or abettor, that he should do, or say something showing his consent to the felonious purpose, or contributing to its execution. 9 *North C.*, 440; *Foster Cr. Law*, 350; 1 *Hale*, 439, 615.

One who incites others to commit an assault and battery is guilty, and may be punished as a principal if the offense be actually committed, though he did not otherwise participate in it. 1 *Brevard*, 397. See also 1 *Leading Crim. Cases*, 149, Note.

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Where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, *without the knowledge or consent* of the others, commits an offense, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention—*Roscoe Crim. Ev.*, 6th Am. Ed., 164, and *authorities cited*—but if in pursuance of a common design, each takes the part assigned him, all are equally guilty. 1 *Russ. on Cr.*, 8th Am. Ed., 27, and *cases cited*.

As to how far an aider and abettor must be *present* at the commission of the crime, see *Russ.*, on *Cr.*, 8th Am. Ed., 508 *et seq.*

When several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the Court may grant a new trial as to those convicted, if they think the conviction improper. 6 *T. R.*, 619; 5 *E. C. L. R.*, —.

The party seeking a *new trial* on the ground of newly discovered evidence must show that the evidence is not merely cumulative: that it was discovered after the trial: that there was no want of diligence to procure the same. 10 *Ind.*, 3.

When evidence is merely cumulative a *new trial* will not be granted. 5 *Ind.*, 250; 6 *Ind.*, 474.

Newly discovered evidence, to warrant a *new trial*, must be such as could not have been obtained on the trial had by reasonable diligence, and must not be merely cumulative. *State ex rel Drulinter v. Clark*, 16 *Ind.*, 97, 103.

A *new trial* is seldom, if ever, granted on account of newly discovered evidence, for the purpose of impeaching the character of a witness. 6 *Blackf.*, 496; 2 *Ind.*, 608; 4 *Ind.*, 492; 22 *Ind.*, 165; 29 *Ind.*, 167.

A *new trial* will not be granted for newly discovered evidence, where, with due diligence, the party might previously have had the benefit of the evidence. 1 *Blackf.*, 367; 6 *Blackf.*, 496; 2 *Ind.*, 117; 4 *Ind.*, 540; 10 *Ind.*, 451; 11 *Ind.*, 238, 541; 13 *Ind.*, 357; 23 *Ind.*, 471.

See Hilliard on *New Trials*.

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IN SPECIAL TERM.

JOSEPH WILLIAMS and GEORGE W. STOUT v.-THE LITTLE
WHITE LICK GRAVEL ROAD COMPANY and FRANZ
ERDELMEYER, County Treasurer.

Before NEWCOMB, Judge. On a motion for an Injunction to restrain the collection of assessment made for construction of Gravel Road.

Appraisers—Majority may act.

Where one of three appraisers appointed to assess the benefits accruing to the owners of land, by the construction of a gravel road, fails to accept his appointment as such, his failure or refusal does not disqualify the remaining two from acting and making such assessments, which are valid.

Assessment—When valid—Assessor—Vacancy, how filled.

An assessment by a majority of the viewers is as effectual as if made by all of them. The appointment of a Special Assessor to fill a vacancy is discretionary with the Commissioners.

State Property—Not subject to assessment for local improvement.

State Property—Sale of, by County Treasurer, unauthorized.

Though the statute requires that the Assessor shall "proceed to view all the lands within one and one-half miles of each of such proposed roads, or either end of the same," * * "to make a list of said lands, and assess the amount of benefits that will result to each tract." * *

Held: That notwithstanding the general terms of the act, land belonging to the State was not intended to be subjected to assessment for the benefit of a local improvement, and that the act itself is incapable of enforcement against State property.

Held: That the County Treasurer can not seize and sell the property of the State in the absence of any statute authorizing such a proceeding.

Laches—Remedy for relief, when lost.

If a party against whom such an assessment has been made, knowing his rights, does not promptly seek his remedy, but allows the company to incur material expenses, and to enter into engagements difficult to be discharged, he will lose his right to an interposition of equity.

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Injunction—Who entitled to.

A party asking for an injunction must show some wrong about to be done him. He can not invoke the aid of equity by showing damage to one not a party to the proceedings.

Dye & Harris, for plaintiffs.

Taylor & Duncans, for defendants.

The plaintiffs pray an injunction against the collection of an assessment on their lands for the benefit of the Gravel Road Company, defendant, under the act of May 14, 1869.

Section 1, of that Act, provides that a gravel road company, having a valid and solvent subscription of at least three-fifths of the estimated cost of the construction of its road, &c., may petition the Board of County Commissioners of the proper County to have assessed the amount of benefits to each tract of land within one and one-half miles of such road, on either side thereof, and within a like distance of either end thereof.

Section 2, makes it the duty of the Commissioners to appoint three freeholders of the County, one from each Commissioner's district, "who shall be termed assessors of benefits to lands under this law," and whose duty it is made, upon receiving notice from the County Auditor, to make all assessments under the act; "Provided, that if either of the assessors should be of kin to the owner of any such land, or should be interested in any such assessment, the County Commissioners may appoint a disinterested freeholder of his district to act in his stead; or if no such appointment shall have been made, it shall then be the duty of the two disinterested appraisers to make said assessment."

In this case, Samuel Rumford, the substituted assessor, was notified of his appointment, and of the order of the Commissioners to make the assessment along defendant's road, but he failed to appear, or to take the oath prescribed in the third section of the Act, and the remaining assessors

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proceeded to view the lands and assess the benefits accruing to the owners from the construction of the road.

The plaintiffs claim that the assessment is void because made by two only of the three assessors appointed.

The statute makes it discretionary with the Commissioners to appoint a special assessor in case one of the three regular assessors is disqualified to act. Having done so, did his failure to accept disqualify the other two from making the assessment? I think not. His non-acceptance left the place vacant, and the case then stood as if the discretion to appoint the special assessor had not been exercised.

But if such result did not follow from the failure of Rumford to accept and qualify, the other appraisers were competent to act, by virtue of the second clause of Sec. 1, of the Act in relation to the construction of statutes, approved June 18, 1852, which provides that: "Words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared in the act giving such authority." 2 *G. & H.*, 337. The meaning of this section is that a majority may act, unless the law conferring the authority expressly, or by necessary implication, requires the concurrence of all. In *Piper v. The Connersville, &c., Turnpike Company*, 12 Ind., 400, the Supreme Court held that the action of a majority of the viewers appointed to assess the damages of a land owner, in consequence of the construction of a turnpike through his premises, was valid.

The statute governing that case required the Circuit Court to appoint three disinterested viewers to assess the damages of the owners of the land, whose duty it should be to report to the Court the amount of damages sustained, if any. There was no proviso in the act under which they were appointed, that less than the whole number might act, but the Supreme Court held that by the general statute of 1852, above cited, an assessment by a majority of the viewers was

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as effectual as if made by all of them; and the same point was similarly decided in the *Cicero Hygienic Draining Co. v. Craighead*, 28 Ind., 274. These cases settle the question raised here, against the plaintiffs.

The complaint further alleges, that the assessment was void because certain lands of one Cossell were so imperfectly described in the list, and assessment, as to amount to no assessment at all. The description given is, "Cossell, Daniel, pt. in s w $\frac{1}{4}$ sec. 6, township 15, range 3 east, 12 acres, benefitted \$27.00."

The defendants answer, that Cossell has fully approved of said assessment by paying the first installment of one-third, which was placed on the proper tax duplicate of Marion County for the year 1869; that he is making no complaint of said assessment, but is satisfied therewith.

I am of opinion that the demurrer to this answer should be overruled. The description of this piece of land is certainly very indefinite, but the case is not to be treated as if it had been omitted from the list entirely. Cossell might perhaps successfully resist a suit on a tax title based on the sale of his land on such a defective description; but if he is satisfied, and is paying his assessments as they fall due, I see no equitable ground on which the plaintiffs can complain of it, or any right on their part to make an objection for him that he declines to make for himself. The ground on which an injunction may be granted is, that some wrong is about to be done to the party asking the injunction. It is an appeal to equity to protect the interests, or to redress the wrongs of the complainant, and not of a stranger to the suit.

The complainant further alleges that the assessment of benefits, &c., was and is void because certain lands were omitted entirely in the list and assessment, that lay within one and one-half miles of defendants road. As to 100 acres of said lands, defendants answer that they were the property of the State of Indiana, being the same lands on which the

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Hospital for the Insane has been established and is maintained. To this answer the plaintiffs demur.

The language of the statute is that the assessors shall "proceed to view all the lands within one and one-half miles of each of such proposed roads, or either end of the same, within their county; to make a list of said lands and assess the amount of benefit that will result to each tract from the proper construction and maintenance of the proposed road, &c." This provision is, by itself, broad enough to include lands of the State, but it is clear to my mind that notwithstanding the general terms of the act, land belonging to the State was not intended to be subjected to assessment for the benefit of a local work, and that the act itself is incapable of enforcement against State property.

The property of the State is by law exempt from taxation, (Acts 1861, page 154). But the gravel road law of 1869, Section 4, provides that the assessments made thereunder shall be a lien upon the land assessed with benefits, and that the assessment shall be collected by the County Treasurer, at the time, and in the manner he collects other taxes; and for this purpose the County Auditor is directed to put upon the tax duplicate the amount assessed each year upon the several tracts of land so found to be benefitted by the construction of the road.

The process to be pursued by the Treasurer, in case the assessments are not paid within the prescribed time, is to levy on the personal property of the delinquent owner, as in other cases of unpaid taxes; or in default of personal property, then to sell the lands assessed; but a County Treasurer can not seize, and sell the property of the State in the absence of a statute directly authorizing such proceeding, and there is no such statute.

But there is another reason equally conclusive against the theory that the lands of the State should have been assessed. The 6th section of the Act makes the parties who have been

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assessed for benefits, stockholders in the road, and on payment of their assessments, certificates of stock are to be issued to them for the amount paid. If the lands of the State can be assessed, the State, on payment of the assessment become, *ipso facto*, a stockholder in the turnpike for the benefit of which her property has been so assessed. But she can not be such stockholder, because the Constitution expressly declares that the State shall not become a stockholder in any corporation, or association. Sec. 12, Art. XI.

This Act, therefore, must be construed as if it contained a proviso that no lands owned by the State should be assessed on account of benefits supposed to result from the construction of the road.

The defendants, for answer to the whole complaint, and by way of estoppel, say, that after said assessments were made, with a full knowledge thereof, and of all the alleged defects in the assessment as set forth in their complaint, and of which defects the Gravel Road Company had no notice or knowledge, the plaintiffs stood by and saw the company expend several thousand dollars in the construction of its road, through and beyond the farms of plaintiffs; that on the faith of said assessments the company entered into contracts for construction that can not be met otherwise than by the means to be raised through said assessments; that plaintiffs knowing, &c., sought and obtained consent of the company to work out, on said road, the assessment of 1869 charged against their lands, and used the receipts of the company for the amount of their work on the road in discharge of said assessment on the County Treasurer's duplicate, and that they had made no complaint of the assessment, nor disputed its validity, until the filing of their complaint in this Court, March 6, 1871.

If for any cause the assessment in question is void, the acquiescence of plaintiffs in it would not make it valid; but their laches in not promptly seeking a remedy by injunction

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furnishes a strong reason why that remedy should not be granted them under the circumstances set forth in this answer. In *Greenshalgh v. Manchester and Birmingham R. W. Co.*, it was held "that if a party is cognizant of his right, and does not take those steps to assert it which are open to him, before he has allowed the adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of equity" 3 M. & C., 784, 799; 2 Eden on Injunction, pages 372, 374, notes.

Applying this principle to the case in hand, the injunction asked should be denied, leaving the plaintiffs to such means of defense against the assessment as they may find outside of the *equitable* jurisdiction of the Court.

The demurrers to the several paragraphs of the answer are overruled.

NOTE. - Final judgment was rendered on demurrer in accordance with the foregoing opinion from which no appeal was taken.—RER.

See 33 *Ind.*, 317, 325; 34 *Ind.*, 36. See also 3 *G. & H.*, 291, note 1. "If a party is guilty of *laches*, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claims to equitable relief—more especially where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses, and enter into engagements and contracts of a burdensome character." *Hilliard on Injunctions*, 43. See also 10 *Cushing*, 253; 1 *Grant*, 412; 5 *Jones Eq.*, 323; 11 *Gray*, 359, and Binney's case, 2 *Bland*, 99; Kerr's *Injunction in Equity*, 202, 210, 628.

Where Commissioners have awarded the owner of land an amount measurably below its value, the corporation for which they are acting may be restrained from entering upon and taking possession of such land. 29 *Ber C.*, 396.

Municipal corporators and tax-payers, unless individually injured, can not enjoin a public wrong. 4 *Kernan*, 356, 506.

An injunction lies against taking land till security is given for the value, though the party has not petitioned for damages. 35 *Penn.*, 231.

As a general rule the compensation should precede, or be concurrent in point of time with the taking. See *Sedgwick on Damages*, 662, 667, and authorities cited.

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IN GENERAL TERM.

GEORGE H. CARTER v. THE AUGUSTA GRAVEL ROAD COMPANY.

Trespass—Practice—Pleading—New Trial—Exceptions.

Where no adverse possession is shown, a plaintiff in an action for trespass upon realty, may recover without showing previous possession.

An adverse entry is not to be presumed, but must be proven.

A complaint in trespass, simply declaring for damages by adverse possession, and for removal of buildings, does not raise the question of title to the real estate.

Where the defendant in an action of trespass justifies by reason of some title or easement, which gives him a legal right to do the act which is the subject of the action, he must set forth the title or right to enjoy the easement specially.

Questions of law, arising upon the finding must be saved by exceptions to the conclusions of law.

A motion for *new trial* is the proper remedy where the finding is not sustained by the evidence.

Finch & Finch, for appellee.

Barbour & Jacobs, for appellant.

BLAIR, J.—The plaintiff alleges in his complaint that he is the owner of certain real estate, and that the defendant, without right, entered upon it and erected thereon a toll house, dwelling house, and out-buildings, and continues to maintain the same thereon, and refuses to remove them, to the damage of the plaintiff; for which damages he asks judgment, and also asks as special relief that the defendant be compelled to remove the buildings. The first paragraph of the answer is the general denial, and a second paragraph sets up a license from the owner of the premises.

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There was a trial by the Court at Special Term, and at the request of the parties, the Court made a special finding of the facts and the conclusions of law thereon. The defendant moved for judgment upon the special finding, which motion was overruled and excepted to by the defendant. Judgment was then entered for the plaintiff. The defendant appeals and assigns for error the overruling of her motion for judgment upon the special finding, and the rendering of the judgment upon the finding for the plaintiff.

No exceptions were taken to the conclusions of law stated by the Court, nor was there any motion for a new trial, and under the practice prescribed by *Section 341 of the Code*, 2 G. & H., 207, the main questions which were discussed in the oral argument of the appellant, and which are presented in the brief, are not properly before the Court for review.

Questions of law arising upon the finding, must be saved by exceptions to the conclusions of law, and are not saved by a motion for judgment on special finding, nor by a motion for a new trial. *Luirance et al v. Luirance*, 32 Ind., 198; *Pedens, Adm'r., v. King*, 30 Ind., 181; *Addleman v. Erwin and Others, Adm'rs*, 6 Ind., 494; *Smith et al v. Jeffries*, 25 Ind., 376; *The City of Logansport v. Wright*, Ib., 512.

If the finding is not sustained by the evidence, or is contrary to law, a motion for a new trial is the proper remedy. *Schmitz v. Lauferty*, 29 Ind., 400.

The evidence is not before us; and the motion for a judgment in favor of the defendant on the special finding of facts, and the conclusions of law thereon, proceeds upon the theory that the finding is correct and sustained by the evidence; and as no exceptions were taken to the conclusions of law, the case is not similar to a special finding of facts by a jury, and a general verdict inconsistent with the facts; in which case the special finding must govern, and a judgment would be rendered on the special finding for the

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party legally entitled to the same, notwithstanding the general verdict.

The special finding of the Court does not indicate that any facts exist to support the plea of license; and hence the defense is limited to such matters as might properly be admitted under the general issue. Although the complaint asked as special relief that the defendant might be compelled to remove the buildings, we regard the prayer as surplusage, the action being merely to recover damages for the alleged trespass, and not to recover possession.

The Court found that the lands described in the complaint, "are bounded on the east by the Michigan road, and include half the road, subject to the public use of said road," and that the plaintiff, and those from whom he derived his title, owned the same, "back to a period anterior to the construction of the Michigan road under the acts of Congress, and the General Assembly of the State of Indiana." These facts, and the further fact that the defendant erected the buildings complained of on the land, as found by the Court, would make a *prima facie* case for the plaintiff. The entire defense, as disclosed by the findings, and as presented to the Court, rests upon the theory that the defendant is possessed of the public easement of the road formerly known as the Michigan road; and that the right of way is one hundred feet wide or, in other words, that the right of the defendant extends to the use of fifty feet of the lands of the plaintiff, extending westward from the center of the road. Such a defense, to be available, must have been set up in answer, for it is a rule of pleading established at common law, as well as by the Code, that whenever the defendant in trespass justifies by reason of some title or easement which gives him a legal right to do the act which is the subject of the action, he must set forth his title, or right to enjoy the easement specially. *Pearle v. Bridges*, 2 Saunders R., 401, and Note 1. *Wood v. Mansell et al*, 3 Blackf., 125; *The President and*

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Directors of the Crawfordsville and Wabash R. R. Co. v. Wright, 32 Ind., 252; *Babcock v. Lamb et al*, 1 Cowen, 238; *Dewich v. Chapman*, 11 John., 132; *Strout et al v. Berry*, 7 Mass., 385.

It is urged that the plaintiff is not entitled to recover because the buildings complained of were erected, and the defendant was in possession holding adversely to the plaintiff at the time he acquired title. It is true that to maintain an action for trespass, the plaintiff must have the actual or constructive possession. *Raub v. Heath*, 8 Blackf., 575.

The English rule required an actual entry by the bargainee before he could maintain trespass, but it is held in the case of *Wood v. Mansell*, 3 Blackf., 125, that "unless there appear to have been an adverse possession of the *locus in quo*, the bargainee may recover in trespass by proving property, without showing also a previous possession."

The finding simply shows that the defendant erected the toll house, &c., on the premises described in the complaint, and does not show any claim of right or title adverse to the plaintiff. An adverse entry is not be presumed, but must be proven. *Pierson et al v. Doe*, 2 Ind., 123, and the authorities there cited. As we think, the finding does not show the erection of the buildings to have been under a claim adverse to the owner, the rule contended for would not apply.

But as we have already stated, this and other similar questions are not properly presented, and saved by exceptions to the overruling of the motion of the defendant for judgment on the special finding; and that the defense urged by the defendant, that she was possessed of the easement or right of way over the premises on which the buildings were located should have been set up specially in answer, the judgment must be affirmed.

The case was transferred to this Court from the Court of Common Pleas, under an agreement waiving nothing as to the taxing of costs, but the costs to be taxed as if no

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agreement to transfer had been made. A motion was made by the defendant to tax all the costs up to the time of the transfer to the plaintiff, "because it appears from the complaint that the title to real estate is in question in this case." The Court overruled the motion to which the defendant excepted. We do not think the title to real estate is put in question by the complaint; the overruling of the motion is fully sustained by authority—*Maxam v. Wood*, 4 Blackf., 297.

Per Curiam—The judgment is affirmed.

Note.—If the plaintiff have the right of property, and of immediate possession, he may maintain trespass, though not in actual possession. 1 *Iowa (Greene)*, 494; *Poole v. Mitchell*, 1 Hill, (S. C.), 404.

See also for principles controlling damages in trespass—*Sedgwick on Measure of Damages*, 5th Ed., p. 143, *et seq.*, and authorities cited.

When the motion for a *new trial* merely shows, that a party claimed that certain evidence was not admissible in any way to affect the terms of a written instrument, without showing that the claim was made when the evidence was offered, or that the evidence was let in subject to exception, and the claim subsequently made that it should be excluded, or that the Court was requested to charge as to its effect, or the consideration to be given it, no question is raised which the Court is bound to consider. 31 *Conn.*, 204, *per Butler, Judge*.

Where the Court below refused a new trial, in the Appellate Court all the evidence must appear in the exceptions. *Hilliard on New Trials*, p. 22.

So the Court above will not revise the action of the Court below in granting a new trial, unless the facts upon which the Court acted appear from the record. *Same*.

A motion for a *new trial* is the proper remedy for error in admitting or rejecting testimony, or in the charge of the Judge to the jury. A motion *in error*, for errors in the declaration, pleadings, and judgment. *Hilliard on N. T.*, p. 12, and citations.

An application for a "new trial" comes too late after "a motion in arrest of judgment" has been overruled. *Same*, and citations.

In general, "a motion in arrest of judgment," affirms the verdict, and precludes a motion for a new trial. 12 *Ind.*, 317.

The verdict of a jury upon questions of fact, or the judgment of the Court acting in place of a jury, will not be disturbed unless *clearly and palpably* wrong. 17 *Barbour*, 388. See also 5 *Ind.*, 261.

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What is not found by a special verdict, will be taken not to exist. 20 *Penn.*, 60; 21 *Pick.*, 509; *State v. Wallace*, 3 *Iredel*, 195.

"Verdicts are to have a reasonable intendment * * If rendered upon substantial issues of fact, fairly presented by the pleadings, they should not be disturbed on account of mere technical defects. So where the record is irregular and confused, but shows a verdict to have been rendered, the presumptions will be in favor of the validity. *Dizon v. State*, 3 *Clarke* (Iowa), 416; *Hilliard on N. T.*, 99, *et seq.*

IN GENERAL TERM.

DAVID SYLVESTER v. DANIEL MACAULEY, Mayor, JOHN S. NEWMAN, *et al*, Members of the Common Council, appellants.

Appealed from RAND, Judge.

Common Council as Public Agents—Powers and Jurisdiction of—Liability for illegal proceedings—Relation of Mayor to.

The Common Council, so far as their administrative or ministerial duties extend, are agents of the city, and as such may contract, among other things, for street improvements.

The jurisdiction of a Common Council is confined to that territory only, which is within the boundaries of the city.

The Council has no power to contract for improvements beyond the city limits, and no assessment will lie, therefore, against property holders abutting such improvements.

A person contracting for a street improvement has a right to presume that the Council had used the proper diligence to acquaint themselves with the city boundaries.

Public agents exceeding, negligently using, or abusing their authority, are liable to the injured party, and the Common Council, as such, in care-

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lessly authorizing improvements beyond their jurisdiction, become personally liable for the value of the work done in obedience to their authority and direction. It is not sufficient to show that they acted *bona fide* and in ignorance of the true city boundary. They are bound to the exercise of reasonable skill and diligence in acquainting themselves with the territorial limits of the city, and are supposed to know the limit of their power.

Affirmative participation in such unauthorized action of the Council is necessary to attach responsibility for its acts.

The Mayor of a city, under the laws of this State, is *ex officio* President of the Common Council, and as such is required by law to attend their proceedings, and in case of an equal division, gives the casting vote, but in no other sense is he a part of the Council, and is not liable for the consequences of proceedings of the Council in excess of its jurisdiction, simply because he signed the ordinance.

N. B. & E. Taylor, for appellee.

J. S. Harvey, R. B. Duncan and John S. Duncan, for appellants.

NEWCOMB, J.—Sylvester filed his complaint against Mary E. Noble, Winston P. Noble, her husband, Daniel Macauley, Mayor, and John S. Newman, Leon Kahn, Temple C. Harrison, William D. Wiles, James H. Woodburn, Wm. W. Weaver, Erie Locke, Isaac Thalman, James McB. Shepherd, Edward Reagan, Austin H. Brown, Robert Kennington, John L. Marsee, Thomas Cottrell, Christopher Heckman, Courtland Whitsett, John Pyle and Frederick Thoms, members of the Common Council of the city of Indianapolis, in which he alleged that on April 30, 1870, said persons described as Mayor and Common Councilmen passed an ordinance for the grading and graveling of Market street, in said city, from the old corporation line east to Highland street, and that the expense of said improvement, except so much as might be occupied by public grounds, owned by said city bordering thereon, and for street and alley crossings, should be assessed against and collected from the owners of the lots bordering on said street. That after the passage of

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this ordinance the Common Council advertised for proposals for doing the work mentioned in the ordinance; that the plaintiff was a bidder for said work; that his bid was accepted, and on May 21, 1871, plaintiff entered into a written contract for grading and gravelling said street in the manner prescribed in said ordinance, and that he completed said work to the satisfaction and acceptance of the civil engineer of said city, who certified the same to the said Council.

That Mary E. Noble was the owner of a parcel of ground fronting on that part of Market street along which said improvement was made, that the amount assessed against her property for said improvement was \$348.54, which she refused to pay, and on December 26, 1870, plaintiff presented his affidavit of these facts to the Council, and asked that a precept might issue for the sale of her real estate so improved, which precept the Council ordered should issue, but which order was subsequently revoked, for the alleged reason that said real estate and Market street improvement was not within the corporate limits of the city of Indianapolis. And the complaint alleges that said street in front of Mrs. Noble's property was not in fact within said city; that he was ignorant of that fact when he entered into said contract, and did said work, but that it was known to the defendants, the Mayor and Councilmen, although, by said ordinance, proposal and contract, they represented and led plaintiff to believe that it was in said city, and that they had jurisdiction and authority to order said improvement and enter into the contract described, and that by said action he was thrown off his guard and prevented from making inquiry, &c.

That Market street west of the old corporation line had been, ever since the incorporation of said city, and was at the time of the passage of said ordinance, &c., a street of the city; and that the part of said street east of said old corporation line to Highland street, so ordered and con-

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tracted to be improved, had been for fifteen years prior thereto, and was at the time a continuation of said Market street, called by that name, and used as, and he believed the same was a street of said city.

The complaint prayed, among other things, for a personal judgment against the Mayor and members of the Council for the amount due for the work done on said street in front of Mrs. Noble's property, in case it should be held that the property was not liable to said assessment.

Noble and wife demurred to the complaint, their demurrer was sustained and final judgment rendered in their favor at Special Term. The other defendants demurred, but their demurrers were overruled.

Kahn answered that, though a member of the Council, he was not present when the ordinance passed, nor when the contract was let, and had taken no part in the transactions complained of. On the hearing his answer was sustained and final judgment rendered in his favor.

Macauley answered specially, denying all fraud, &c., and alleging that as Mayor of the city it was his duty to preside over the Common Council when in session, and to sign the ordinances it might pass; that he did so preside at the time of the passage of the ordinance in question, and signed the same as Mayor; but that he did not vote for the ordinance, (as he could not except in case of an equal division of the Council) nor advise the passage thereof; "that at the time the ordinance passed, and during all the subsequent proceedings, until the precept was ordered in by the Council," he supposed and believed that so much of Market street as was proposed by said ordinance to be improved, was within the corporate limits of Indianapolis, and that the Council were acting within the scope of their authority; that the plaintiff had the same belief and the same knowledge on the subject. To this answer a demurrer was sustained,—the defendant excepted.

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All the Councilmen except Kahn answered, admitting that as members of the Council they voted for said ordinance and to approve the letting of the contract to plaintiff; that they so voted by mistake, without fraud or intentional wrong, and under a misapprehension as to the locality of so much of Market street as it was proposed to improve; that plaintiff and the owners of the lots of land fronting on, &c., at the time of the passage of the ordinance, the letting and performance of the work, &c., believed that that portion of Market street lying, &c., was within the city; that on that point plaintiff had like knowledge with said defendants, and that they acted in good faith as members of the Council, and without any intention of defrauding, or injuring the plaintiff. Demurrers were sustained to these answers, and the defendants having declined to answer further, after hearing proof of plaintiff's damages, final judgment was rendered against Macauley and all the Councilmen but Kahn.

The questions arising on appeal are as to the sufficiency of the answers.

The record presents the case of a mutual mistake by the parties as to the actual boundary of the city of Indianapolis at the points named in the proceedings had by the Council; and the question to be decided is, whether the members of the Council, acting in good faith under the belief that the territory described was a part of the city, and having made no representations to the plaintiff on that subject other than appear in their official proceedings in advertising for bids and making the contract with the plaintiff set out in his complaint, are personally liable to him for the value of the work he did on the supposed street, because they exceeded their statutory authority in ordering the improvement, and contracting with the plaintiff in their official capacity, for its execution?

Neither the complaint, nor answer informs us of the cause of this mistake as to the city boundary, further than it may

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be inferred from the statement of the complaint that the thoroughfare in question had been for fifteen years used as a street, and was a continuation, and called by the name of Market street, from the old corporation line east to Highland street. Whether proceedings had been had by the City Council to annex this territory, which had, subsequently to the contract with plaintiff, been found inoperative for that purpose; or whether the County Commissioners had ordered its annexation to the city, without having taken all the statutory steps requisite thereto, or whether there was a confusion in the eastern boundary of the city, which, by a subsequent correction, was located west of the line of improvement named in the contract with the plaintiff, does not appear.

If the general principles of the law of agency are applicable to this case, the members of the Council who invited bids for the work described in the complaint, and voted to approve the contract, are liable in their individual capacity for the value of the work done under the contract.

In discussing the personal liability of agents, Mr. Story says: "Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will, (in some form of action) be personally responsible therefor to the person with whom he is dealing, for, or on account of his principal. There can be no doubt that this is, and ought to be the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for his principal, for it is an intentional deceit. The same rule may justly apply, where the agent has no such authority, and he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud. But another case may be put, which may seem to admit of more doubt; and that is, when the party undertakes to act, as an agent, for the principal, *bona fide* believing that

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he has due authority, but in point of fact, he has no authority, and therefore he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud, or moral turpitude. This whole doctrine proceeds upon a plain principle of justice, for every person so acting for another, by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement." Story on Agency, § 264; *Long v. Colburn*, 11 Mass., 97; *Bullou v. Talbott*, 16 Mass., 461; *Feeter v. Heath*, 11 Wendell, 477; *Smout v. Ilbery*, 10 Mass. & Welsb., 1, 9, 10.

And a public agent who exceeds his authority, or who negligently uses or abuses his authority, is liable to the party injured thereby. "And in cases of this sort," says Mr. Story, "it is not sufficient for public agents to show that they acted *bona fide*, and to the best of their skill and judgment, for they are bound also to conduct themselves with reasonable skill and diligence in the execution of their trust." Story on Agency, §§ 319, 320; *Bullou v. Talbott*, *supra*; *McHenry v. Duffield*, 7 Bl'kf., 41; *Potts v. Henderson*, 2 Ind., 327; *Hill v. Smith*, 2 Bing., 526.

In the case at bar the Council may be regarded as claiming to be agents for the city, so far as the contract provided for paying for the improvement of street, and alley crossings from the city treasury; and as agents of the property holders along the street to the extent that the contract stipulated, that the cost of the improvement should be assessed against the lots abutting on the street. (*Beard v. City of Brooklyn*, 31 Barbour, 148.) But they had no authority to bind either in this case, because the territory in which the improvement was ordered, was not within the city, and therefore no jurisdiction had been conferred upon them. Members of a City Council are bound to the exercise of reasonable diligence,

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at least, to ascertain the extent of the territorial limits within which they have authority to act; and when they invite proposals for improvements, which they have no right to order, except within the city, they do thereby practically assert that they have used such diligence in ascertaining the extent of their territorial jurisdiction, and that, after due examination, they have adjudged the territory within which the proposed work is to be done, to be within the corporate limits of the city.

We think, in this case, that the plaintiff had the right to rest on the assumption that the members of the Council had so performed that duty, without prosecuting further inquiries as to the exact city boundaries. He avers that he did rely on the representation of the defendants, and that he was thereby induced to bid for the work, and make the contract alleged.

The answer concedes that the plaintiff was in fact ignorant that this extension of Market street was outside of the city, and that he was so misled by the action of the Council in advertising for bids for making the improvement. The defendants allege like ignorance on their part, but they fail to show that they had used any diligence, or made any effort whatever, to inform themselves whether the street in question was within the geographical boundaries of the city; nor does the answer allege any excuse for their want of knowledge that the street they engaged the plaintiff to improve was outside the territory over which the City Council had jurisdiction. We hold, therefore, that the judgment at Special Term against the members of the Council who participated in the proceedings complained of, was right, and affirm the judgment as to them. But the defendant, Macauley, does not stand on the same footing with the members of the Council. He did nothing in the premises save to sign, as Mayor, the ordinance ordering the improvement. This was his duty under the statute. (*Davis*, 106;

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Sec. 78.) The mere attestation of the Mayor that the ordinance had passed the Council by the requisite number of votes worked no injury to the plaintiff, and a majority of the Court are of the opinion that the judgment as to him should be reversed.

NOTE.—The Common Council of a city have the right to regulate the streets, alleys and sidewalks, to improve and repair the same. In such case, there is no individual liability, either civilly or criminally, unless they acted corruptly. *Baker v. The State*, 27 Ind., 485; *Wood v. Mears*, 12 Ind., 515; *City of Vincennes v. Richards*, 23 Ind., 381; *City of Indianapolis v. Imberry*, 17 Ind., 175.

The Mayor and Councilmen of the city shall constitute the Common Council. The Mayor shall be the presiding officer of the Common Council, and shall have a casting vote in all cases, when a tie, but not otherwise. *Waldo v. Wallace*, 12 Ind., 569.

Cities are created and endowed by the Legislature, with certain powers called Charters, and in their action, these cities must be confined within the limits that a strict construction of the grants of powers in their Charters will assign to them. 5 Ind., 38.

It may also be considered as settled that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government. *Ross v. City of Madison*, 1 Ind., 281, and authorities cited; 26 Ind., 17, and authorities cited.

The members of the Council are personally liable, if the agents of an individual would be, under the same circumstances. *Johnson v. The Common Council of the City of Indianapolis*, 16 Ind., 227.

A person contracting with a city, for the improvement of a street in such city, is bound to take notice of the provisions of the general law regulating such improvements; and must also ascertain whether the Common Council have so conducted the letting, as to render property holders liable for the improvement. 16 Ind., 227.

A distinction exists between the legislative powers of the Common Council and the exercise of their rights over property belonging to them. No act done by them in regard to their property, can be set up to restrain them from acting in matters which require legislation for the city interests, and no act done by them in the former capacity can deprive them of the power of passing such laws as may be deemed necessary for the public good. *Superior Court (City of Albany, N. Y.)*, 6 Abb., 273.

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Corporations, like individuals, may be bound by implied contracts, to be deduced from corporate acts, without either a note, writing or deed. But in applying this rule we must be careful to not violate the rule that no act can be made valid which is without the power of the corporation, or the scope of its authority. *New York & Harlem Railroad Co., v. Mayor, &c., of New York*, 1 Hilt., 562.

Courts are bound to assume, that where a discretion is vested in a municipal body, as to exercising functions of a legislative character, good reasons existed for the adoption of a regulation or ordinance, which was the result of such a discretion. *Sama*.

The general agent of a corporation, clothed with certain powers, by the Charter, or by the lawful act of the corporation, may use those powers for an unauthorized or even a prohibited purpose in his dealings with an innocent third party, and yet the corporation may be held liable for his acts. 24 Ind. 457.

A private corporation is liable in damages to individuals for injury to their property, although no remedy for such injury is provided by the act of incorporation. 14 Conn., 153; 15 Conn., 312; 2 Johns Ch., 162; 9 Ind., 433.

Also liable for damages to property, by creating a nuisance under municipal authority. 20 Ind., 131.

One who acts for another, by a natural, if not a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. *Story on Agency*, 264.

See also 1 Ind., 291, 381; 26 Ind., 17; 29 Ind., 187; 25 Ind., 512; 6 Ind., 237; 14 Ind., 399; 16 Ind., 441; 30 Ind., 235, also 192; 17 Ind., 175, 169, 269; 19 Ind., 135; 5 Ind., 38; 20 Ind., 315; 22 Ind., 491; 28 Ind., 378; 12 Ind., 569, 515; 8 Ind., 54; 27 Ind., 485; 30 Ind., 192; 22 Ind., 491; 3 N. Y., 463; 5 N. Y., 369; 3 Hill, 612; 3 Comst, 463; 4 Ohio St., 80; 1 Seldon, 369; 4 Comst., 195; 18 Pa. St., 187; 20 Howard, 185.

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IN GENERAL TERM.

EPHRIAM BOHRING v. DELOSS ROOT, *et al*, appellants.

Appeal from BLAIR, Judge.

Promissory Note—Surety.

Suit against B., as surety on a promissory note executed by A., A. having been adjudicated a bankrupt.

Defendant answered that plaintiff, without his knowledge, extended the time of payment for a consideration, and by so doing released him from further liability as surety. The plaintiff in reply declared, *First*, that no consideration was given for the extension.

Second, That defendant had received security from A to indemnify him against loss on this note, and that he still held such security.

Third, That defendant, after extension of payment, consented to, ratified, approved, and confirmed such extension.

Held: On demurrer to these several issues—

First, That if the agreement to extend the time for payment was made without any valid consideration, it did not release the surety.

Second, That where the surety is fully secured by property in his hands, he is estopped from objecting to any extension of time made between creditor and principal. Such security being, in effect, an appropriation by the surety of that portion of the effects of the principal to the payment of the debt.

Third, Where a demurrer to a paragraph of the reply has been overruled, and on the trial the issue made by such reply is found against the plaintiff, the defendant can not complain of the ruling on his demurrer.

Pleading—Departure in—How remedied.

A departure in pleading can not be reached by motion in arrest of judgment, but objection must be taken advantage of, by motion or demurrer, before the issues are completed.

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Dye & Harris, for appellee.

N. B. & E. Taylor, for appellants.

NEWCOMB, J.—Bohring sued Mahlon B. Pentecost and Deloss Root on a promissory note for \$800, dated February 17, 1870, due eight months after date. The face of the note showed that Root executed it as surety for Pentecost. There was a verdict and judgment against Root alone, Pentecost having been adjudged a bankrupt by the U. S. District Court.

Root's answer set up, among other defences, that on January 31st, 1871, after the maturity of the note, and without his knowledge or consent, the plaintiff, in consideration of the sum of twelve dollars, to him paid by Pentecost, extended the time of payment of the note for the period of six months from said last mentioned day; whereby he, as such surety, was discharged, &c.

Several replies were filed to this answer, only three of which, the second, third, and sixth, need be noticed.

The *second* paragraph of the reply was, that the extension set up in the answer was given without any consideration whatever. A demurrer to this reply was overruled, which is the first error assigned. We think the demurrer was properly overruled. If the agreement to extend the time for payment was made without any valid consideration, it did not release the surety. *Halstead v. Brown*, 17 Ind., 202; *Kirby v. Studebaker*, 15 Ind., 45.

The *third* paragraph of the reply alleged that Root, on April 1, 1870, before maturity of the note, demanded and received from Pentecost, to indemnify the former against loss as surety on this and other liabilities of the latter, the negotiable note of Pentecost for the sum of \$7,000, payable ten months after date, with interest, and attorney's fees, if suit should be instituted, &c., and at the same time took from Pentecost a mortgage on real estate in Marion county,

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of the value of \$16,000, to secure the payment of said note. It was further averred that the note for \$7,000 more than equalled all the liabilities of Root as surety of Pentecost, including the note sued on, and any expenses he might be subjected to in connection therewith; and that it was sufficient and ample to fully indemnify him; that Root still held said note and mortgage, and refused to assign the same to plaintiff, or in any way give him the benefit thereof.

A demurrer to this paragraph was overruled, and the ruling thereon is assigned for error.

Was the demurrer correctly overruled?

In *Chilton et al v. Price et al*, 4 Ala., 324, which was a case similar, in its essential features, to the present, it was held that "the taking, by the sureties, of a deed of trust, or a mortgage, from the principal debtor, to secure them from liability, and *ample* for that purpose, is in effect an appropriation by them of that portion of the effects of the principal to the payment of the debt, and they will not be permitted to urge that they are not responsible."

This Alabama case was followed and approved in *Smith v. Steele*, 25 Vt., 431. We quote the following portion of the opinion delivered by Chief Justice Redfield in the latter case :

"Upon general principles, it seems to us, that so long as the surety was fully secured, by property in his hands, he should be estopped from objecting to any enlargement of the time of payment made by arrangement between the creditor and principal. If this fact is known to the creditor, it would certainly place his conduct in a very different light from what it is where no such indemnity exists. We can all see, that in such a case there can probably be no fraud in fact. And in equity (and in law, we think the rule should be the same) there is no fraud if such indemnity exists, whether known to the creditor or not. And this ground of defense for the surety, goes upon the supposed basis of fraud. 1 Story, Eq.,

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§. 327. In such a case the surety is the virtual principal, and ought to be bound by every enlargement of the time of payment, quite as much, perhaps more, than on joint principals by such a contract made by one of their number and the creditors, of which there is no doubt."

See also *Moore & Barney v. Paine*, 12 Wendell, 123; *Cushing v. Gore et al*, 15 Massachusetts, 69; *Eastman et al v. Foster et al*, 8 Metcalf, 19; 1 Parsons on Bills and Notes, 241.

In the light of these authorities we think the ruling of the Judge at Special Term was correct.

The *sixth* paragraph of the reply set up that after the payment of the note had been extended as alleged in Root's answer, the same was duly made known to him, and that he "consented to, and ratified, approved, and confirmed such extension." A demurrer to this paragraph was overruled, which presents the next question to be considered.

Without stopping to discuss the proposition whether a subsequent ratification by the surety of an extension of time given for a consideration, and without his knowledge, by the creditor to the principal debtor, is sufficient to revive the liability of the surety it is enough to say that in the case at bar the jury, in answer to a proper interrogatory, found against the plaintiff on the issue made by this paragraph of his reply. Consequently the ruling of the Court on the demurrer could not possibly have worked any injury to the defendant.

After the verdict the defendant, Root, moved, in arrest of judgment, for the following causes:

First, That the complaint was not sufficient to entitle the plaintiff to judgment.

Second, That the Court erred in overruling the demurrer in the third paragraph of the reply.

Third, That the third paragraph of the reply was a departure from the complaint.

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Fourth, That it was shown by the special findings of the jury, that the plaintiff was entitled to a verdict only on the matters set forth in the third paragraph of the reply, and that said paragraph was a departure from the complaint, and did not entitle the plaintiff to a judgment.

There is nothing in the objection to the sufficiency of the complaint, and we have already decided that the Court committed no error in overruling the demurrer to the third paragraph of the reply.

The reply was not, as we think, a departure; but if it had been, the error could not be reached by a motion in arrest. In *McAroy v. Wright*, 25 Ind., 22, it was held that an objection to a departure in pleading can be taken advantage of only by motion, or demurrer, and that it is not a cause for arresting judgment.

The judgment at Special Term is affirmed with costs.

NOTE.—If the holder of a note, for a valuable consideration, give time to the maker, he thereby discharges the surety. *Cooper v. Gibbs*, 4 McLean, 396; 2 McLean, 74, 99, 451.

The giving of time to the maker of a note, who is a certificated bankrupt, will not discharge the endorser, for he is not thereby prejudiced. *Tiernan v. Woodruff*, 5 McLean, 350.

The indulgence which will discharge an endorser must not only be on a good consideration, but for a limited and definite period. 4 McLean, 88.

It is a settled rule of law, that extending to principals further time of payment, without consideration, will not discharge the surety. See *Brightley's Digest on Federal Decisions*, page 824, on "*Discharge of Sureties*," and cases cited.

When the payee upon sufficient consideration extends the time of payment to the principal, without the consent of the surety, the latter is discharged, the payee being equitably estopped. *Dickerson et al. v. The Board of County Commissioners of Ripley Co. et al.*, 6 Ind., 128.

The payment of interest in advance is a sufficient consideration to support an agreement for further forbearance. *Same*.

An agreement with the principal, in order to release the surety in a written instrument, need not operate to release the debt. *Same*. See also *Zimmerman v. Judah*, 13 Ind., 286, and authorities cited.

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An oral agreement by the payee of a promissory note with the principal maker, without the knowledge or consent of the surety, whose suretyship is known to the payee, to extend the time of payment during a definite period beyond the maturity of the paper, is valid, and releases the surety, if founded upon a sufficient consideration. *Pierce v. Goldsberry*, 31 Ind., 52.

IN SPECIAL TERM.

NORTON R. SMITH v. TIMOTHY R. FLETCHER.

On motion for new trial, before BLAIR, Judge.

Husband—When liable for purchases by wife.

Goods purchased by wife when she was already sufficiently supplied with articles of the same kind, are not necessary articles, and recovery can not be had against the husband for their value.

*Cohabitation—Law presumes husband to assent to contracts
—How presumption may be repelled.*

In a legal sense, husband and wife can not be considered, living separate, and apart, though they do not live together, if cohabitation continues between them. The law presumes that during cohabitation the husband assents to contracts made by the wife for articles suited to their means and station in life, as the implied agent of her husband, and he is held liable on such contracts.

Misrepresentation, of what may be necessary, may be repelled *inter alia*, by showing undue extravagance of the wife.

Wife—When can not bind husband by her purchases.

If, however, the husband supplies her properly, with means, or necessities, whether living with her, or living separate and apart from her—in either, and in such case, she is not his agent, and can not bind him by her purchases.

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Merchant—When husband not liable for wife's purchases.

It is not incumbent upon the husband to show that at the time of the purchase by the wife the tradesman knew that she was already supplied. He supplies the articles at his own peril if he takes no pains to ascertain whether or not the necessity exists, and if necessity does not exist, the husband is not responsible.

Voss & Davis, for plaintiff.

N. B. & E. Taylor, for defendant.

The plaintiff brings this suit to recover for a bill of goods alleged to have been sold, and delivered to the defendant.

The issues joined in this case, and upon which the parties went to trial, present the questions whether the defendant and his wife lived separate and apart from each other, and whether that separation was the fault of the husband, or of the wife, who purchased the goods, or whether or not the goods were necessities.

The plaintiff proved the sale of the goods to the wife of the defendant.

The defendant introduced no evidence to show that their being separate was the fault of the wife, and hence all evidence relating to the conduct toward each other, of the defendant and his wife was excluded. All the evidence offered, bearing upon the question of their living together, was admitted.

I think there was no evidence excluded, therefore, that would have been proper to be considered by the jury, unless it was the fifteenth question, and answer, in the deposition of James D. Fletcher, as bearing upon the question whether or not the goods purchased by the wife were suited to her station, &c., in life.

The witness was asked to compare the quality of the goods purchased by the wife of the defendant with those usually purchased by the defendant for her. In the sense of ascertaining the position in society and standing, which the

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defendant had authorized her to assume, this question would seem to be relevant. But the answer of the witness, I conceive, gives no facts which should have weight with the jury. He says *some* goods purchased by him for *her* were *more costly*, but he gives no clue to the kind of articles, to show that they were similar. He only speaks of a gold watch for her, costing \$115, and a diamond pin, which the witness was wearing, that cost \$150. It is not shown that she was ever in the habit of wearing the diamond pin, or that it was really bought for her use. The witness says the defendant bought it, and gave it to his wife, and he was wearing it. The inference is, that it was not for her to wear, and was not a ladies pin. And the only importance that can properly be attached to the statement is, that the witness was giving his testimony when in full dress, and wearing costly jewelry.

I conclude, therefore, that there was no error in excluding this part of the evidence.

The objections urged most, are to the instructions given by the Court. I think there was no error in the statement of the issues joined. It is true, as before stated, that the question as to who was to blame for the separation of the defendant and his wife, was not entered into, the evidence. But as this proved only one of the questions combined with the others in the same answer, a plain statement of the issues joined on paper can not be supposed to have misled the jury. The jury were instructed, that if they should find "that at the time the goods were purchased the wife was already sufficiently supplied with articles, of the kind purchased, you can not in such case find that the articles purchased were necessities." It is insisted that this instruction was erroneous, because the plaintiff is not bound to inquire whether she was already supplied, and to relieve the defendant from liability, the plaintiff must have knowledge that the wife was already supplied.

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The jury were also instructed, that if at the time of the purchase they were living separate and apart, "and she was possessed of sufficient means of support, held in her own right, whether furnished by the defendant, or arising from her separate estate, the defendant can not be held liable even for necessities," * * * unless he promised to pay for them.

It is insisted that this instruction was error, for the reason, that unless the plaintiff in such case has knowledge of her being so supplied, the husband will be liable, and that he is not bound to inquire before selling the goods. These objections can conveniently be considered at the same time. The facts of the case presented some peculiarities not usually met with. The defendant and his wife neither lived separate and apart, nor did they live together in the sense in which those terms are usually employed. The defendant resides most of the time in this city by himself. The wife keeps house, and resides most of the time in Dayton, Ohio. The defendant occasionally goes to Dayton, or did prior to, and up to about the time of the purchases, and while there made his home with his wife, cohabiting with her, and assisting in supplying the household with provisions, &c. His wife, up to about the time, or shortly before the last purchase was made, was in the occasional habit of coming to this city, and cohabiting with her husband. The house at Dayton seems to have been almost exclusively under the control of the wife, though the defendant, when in Dayton, speaks of it as his home, but all the facts and circumstances seem to point it out as her establishment. She was possessed of means, sufficient of support, equal, or almost equal, to that of the defendant, her husband. In this view of the case, it is not very important whether they lived together or lived apart, in the ordinary sense of these terms.

The objections to the instructions present the true questions:

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First, If they lived together, or if they lived separate and apart, and the wife was already sufficiently supplied with articles of the kind purchased, can the husband be held liable for purchases made by the wife, of a tradesman who had no knowledge of her being so supplied.

Second, If she had sufficient means of her own to supply her wants, can the husband be held liable, while she is living apart from her husband, even for necessities supplied by a tradesman who has no knowledge of the means possessed by the wife.

The case of *Lison v. Brown*, 20 Ind., 489, is cited in support of the position assumed by the plaintiff, that the tradesman must be shown to have had knowledge, and that it is not his duty to inquire as to facts and condition of the parties. In the case cited the action was against the husband to recover for the board of the wife while living separate from her husband, and prior to a decree of divorce. When the wife went to Court with the plaintiff, and for some time afterward, she had no means of her own. She afterward received money and loaned a part of it to the plaintiff, and the Court says "the wife, after the receipt of the money from Brown, was possessed of means sufficient to supply her reasonable wants and necessities up to the time of the decree of divorce; the plaintiff knew that fact, and therefore had no claim to the defendant for the wife's board during that period; but for the time prior to the receipt of that money, we think the defendant was liable.

It will be seen that there was nothing in the case calling the attention of the Court to the materiality of knowledge on the part of the plaintiff that the wife had means of her own, and although the language of the Court might lead one to infer that some stress was laid upon the knowledge possessed by the plaintiff, it can not be said that the Court held it material, and that the decision would have been otherwise had the plaintiff been ignorant of the receipt of means by the wife.

An examination of the grounds upon which the husband is held liable upon contracts made by the wife, for the supply of necessary articles, suitable to their means and station in life, will aid us very much in determining the questions presented. The husband is bound to support and maintain the wife, and to furnish her with necessaries, and the law presumes, that during cohabitation, the husband assents to contracts made by the wife, for the supply of articles suited to their means and station in life. The law presumes that in such cases, the husband makes the wife his agent, and it is because she is the implied agent of the husband that he is held liable on such contracts. *Litson v. Brown, supra.*

This presumption of law may be rebutted; it is not conclusive. The presumption may be repelled in a variety of ways. Evidence showing the extravagant nature of the wife's order is properly admitted as tending to negative the husband's authority. *Lane v. Ironmonger*, 13 M. & W., 368. The principles that lie at the foundation, therefore, of the law upon this subject, lead us to the following proposition. If the husband and wife are living together, or living separate and apart from each other, under such circumstances, that he is bound to support her, and he omits to furnish her with necessaries, (if they are living together, or if living separate, and she has not the means of procuring them), he makes her his agent to procure them; if he supplies her properly in either case, she is not his agent.

It is scarcely necessary to say, in view of these principles, which are abundantly sustained by authority, that it is not incumbent upon the defendant to show that the plaintiff, at the time of the purchases by the wife, knew that she was already supplied, or that he knew that she possessed sufficient means of support. But there are several cases directly in point upon these questions.

In the leading case of *Mortague v. Benedict*, 3 B. & C., 631, Justice Holroyd uses the following language: "When

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a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the article at his own peril; and if it turns out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge."

In the case of *Seaton v. Eenedict*, 52 Bing., 28, Chief Justice Best uses the following language: "It may be hard on a fashionable milliner, that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, can not enter into these little delicacies, but must lay down a rule that shall protect the husband from the extravagance of the wife." Many other cases could be cited in support of the same view—in fact, I have found none holding otherwise. *Mizen v. Peck*, 3 M. & W., 481; *Reeve et al v. The Mayor of Covington*, 2 C. & H., 644; 2 Smith's Leading Cases, 488.

NOTE.—If the husband makes suitable provision for the wife, he is not liable when she, without his approbation, expressed or implied, undertakes to pledge his credit, though for what might otherwise be deemed necessities. *Bishop on Marriage and Divorce*, Vol. 1, page 553, § 553.

"Cohabitation is presumptive evidence of the assent of the husband" to being bound by the wife's contract for "necessaries" for herself and family, but nothing more. And by the word "necessaries," as here used, is perhaps meant, those things which are *prima facie* such, not taking into account the matter of the husband's supplying, or failing to supply, the things in sufficient profusion, by his own personal order; yet, if she obtains an over supply, whether from one trader or many, the agency will not be presumed. *Ibid*, § 556.

Presumed Agency: If the husband leaves for a temporary purpose the matrimonial habitation, and leaves house and effects in the care of his wife, there is a presumption, the precise extent of which varies with circumstances, and is not well defined in the law, that she has authority to deal with such property, and to pledge his credit. *Ibid*, § 561.

He is bound to fulfill the contract of his wife, when it is such a one as wives, according to the usage of the country, commonly make. If a wife should purchase at a merchant's store, such articles as wives in her rank in life usually purchase, the husband ought to be bound; for it is a fair pre-

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sumption that she was authorized so to do by her husband. *Reeves' Domestic Relations*, page 158, 3d Ed.

In seeking for that point at which the husband's liability on the contracts of his wife for goods ceases, several circumstances are to be taken into consideration: 1. The standing of the parties in society as to wealth. 2. Whether the goods furnished were necessaries. 3. Whether the articles furnished were such as the wife was accustomed to contract for with his consent, or whether he voluntarily received any benefit from the contract. In addition to this, it is sometimes necessary to consider the husband's willingness to furnish her with necessaries; for if he is sought to be charged on the ground of his misconduct, or refusal to furnish them, other circumstances must concur. What might be considered necessaries in one case, would not in another. (*Montague v. Benedict*, 3 Barn. & Cress.) But if the husband permits his wife to assume a style, and appearance in life above her real station, he is liable for necessaries suitable to such apparent condition. *Hunt v. DeBlanchiere*, 5 Bing., 550.

The husband is bound by his wife's contracts for necessaries for herself, when he refuses to provide them. This rests wholly on the ground of its being a duty in him to provide necessaries for his wife, which the law will enforce. His consent is not necessary, and it can never be presumed in the case where he refuses to provide them for her. If he should turn her out of doors, and forbid all mankind from supplying her with necessaries, yet he would be bound to fulfill her contracts for necessaries. The case is the same if she depart from her husband with reasonable cause, and refuse to cohabit with him. *Reeves on Domestic Relations*, page 160, 3d Ed.

He must maintain his wife with necessaries, according to his rank in life, as long as she cohabits with him, and when she does not, if she have sufficient reason for refusing so to do; but if she depart without cause, he is not chargeable with her contracts for maintenance. *Ibid*, 161, and Note 1.

But if the wife departs from her husband without cause, and without his consent, he will not be chargeable. *Manly v. Scott*, 1 Mod. Rep., 128.

Those who trust a wife, who has separated from her husband, do it at their peril. They must look to the grounds of their separation. *Billing v. Pilcher*, 7 B. Monr., 458, and 5 R. I., 343.

If the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his circumstances and condition in life, and pays it according to agreement, he is not answerable even for necessaries. *Calkins v. Long*, 22 Barbour, 97.

But in an action against a husband, for goods supplied to his wife, living apart from him, the plaintiff must adduce some evidence of the circumstances of the separation to show that the wife had authority to bind her husband for necessaries. (*Edwards v. Towels*, 6 Scott, N. R., 641.) Where a party is especially forbid to furnish the wife, in order to make the hus-

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husband liable, he must prove that the husband did not supply her with necessaries suitable to her condition. *Most v. Oumstick*, 8 Wend., 544; *Baker v. Barney*, 5 Johns. Rep.; *Turner v. Lewis*, 10 Johns. Rep., 38.

When the wife does not cohabit with the husband, they having separated by mutual agreement, and the wife has a separate allowance; if this separation be a matter of notoriety, the husband is not chargeable for her contracts, although made for necessaries. *Recess' Domestic Relation*, 3d Ed., page 165.

Husband may, as long as wife cohabits with him, forbid certain parties from trusting her, unless the prohibition is so extensive as to render it impossible or difficult for her to procure necessaries, when such prohibition would be of no avail. *Recess' Domestic Relation*, 3d Ed., page 165.

If a husband and wife are living separate, inasmuch as such separate living is just as consistent with a state of facts in which the husband would not be liable on her contracts for necessaries, as with a state of facts in which he would be so liable, the creditor, who has trusted her on her husband's account, must prove the existence of the circumstances from which the liability springs. *Dishep on Marriage and Divorce*, Vol. 1, § 620.

But the marital relation alone will not render a husband liable, by raising a presumption of agency in the wife, where her orders for goods are of an extravagant nature, disproportionate to the husband's apparent ability." 1 *Greenleaf, Es.*, 12th Ed., p. 51, and authorities cited.

IN GENERAL TERM.

MATILDA KEMP, Appellant, v. CHARLES DICKSON, JAMES C. DICKSON, WALLACE E. DICKSON, and CHARLES GRIFFIN, Appellees.

Appeal from BLAIR, Judge.

Debt, assignment, admission—Husband and wife—Agency.

An assignment of a debt, carries with it all collaterals given to secure its payment.

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An assignment of a note, "without recourse," will not release the collateral given to secure the payment of the note, unless so stipulated, at the time of assignment, and without such agreement, the security passes with the note.

A person holding collaterals to secure the payment of a debt, holds them simply as a special trustee.

Where a statement is made by the assignor, to the agent of the assignee, pending the negotiation for the note, that he held a certificate as collateral for the security of the payment of the note,

Held: Such an admission is competent in evidence to show notice to the assignee of such security, when he purchased the note.

A husband who acted as an agent for his wife, in the transaction of her business, is not a competent witness in a suit brought by the wife, to prove the transactions of such agency.

N. B. & E. Taylor, for appellant.

Mitchell & Ketcham, for appellees.

RAND, J.—This was a suit brought by Matilda Kemp against Charles Dickson, James C. Dickson, and William E. Dickson. The complaint is in two paragraphs. The first alleges that plaintiff is the owner of a certificate of twenty shares of the capital stock of the Hydraulic Woolen Mills Company, of Columbus, Indiana, of the value of \$1,000, of which the defendants have the possession without right.

The second paragraph is the same, in substance, as the first, with the further allegations, that on the same day plaintiff became the owner of said certificate, M. Kemp & Co. executed to defendants their note, at one day, for \$1,367.53, and that plaintiff and Mathew Wilson endorsed said certificate to defendants by collateral security for said note, with authority to sell the same at best rates, first advising M. Kemp & Co. of the amount that could be realized for it. "And plaintiff further says that before any sale was made that defendants assigned the note, without recourse, to Charles Griffin, and defendants continued to hold said certificate, and that plaintiff had demanded the

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same of defendants, but they refused to surrender it, but converted it to their own use."

Defendants answered the first paragraph of complaint by a general denial, and also that said certificate was the property of Charles Griffin. There was a demurrer to this last paragraph which was overruled and excepted to. It is not now urged that the overruling this demurrer was error.

Defendants demurred to second paragraph of complaint, but it was overruled and excepted to. Charles Griffin asked to be made a party, which was done, and he filed his answer and cross complaint, alleging that he was the holder of the note for \$1,367.53, which had been assigned him by the Dicksons, on M. Kemp & Co.; that plaintiff, Matthew Wilson, Joseph Green and Hiram Solend were partners, and composed the firm of M. Kemp & Co.; that said note is wholly unpaid; that plaintiff, on the 12th of January, 1871, had assigned said certificate to his co-defendants, the Dicksons, as collateral security for the payment of said note; that on the 20th of January, 1871, the Dicksons assigned said note and certificate to defendant, and that said Dicksons agreed to hold said certificates as defendant's agents.

The Dicksons answer the second paragraph of the complaint, and Griffin's cross complaint, stating that they held the certificate as collateral security for the payment of said note, and that on the 21st of January, 1871, they assigned said note and certificate to Griffin, and that they now have no interest in said certificate, and bring the same into Court. There was a general denial to Griffin's cross complaint, by plaintiff, and a reply in general denial to Dicksons' answer.

The case was, at Special Term, submitted to Court for trial and judgment, and the Court found for defendant, and decreed that Dicksons should hold said certificate as collateral security for the payment of said note until it was paid, and a judgment for costs was rendered against plaintiff.

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From this decree there was an appeal by plaintiff to General Term. The evidence is all in the record.

It is insisted that the finding of the Court was contrary to the evidence. We have carefully read it, and we are of opinion that the evidence sustained the finding of the Court below. The evidence shows, and, in fact, the second paragraph of complaint says, that the certificate of stock was transferred to the Dicksons as collateral security for the payment of said \$1,367.53 note, and it claims that the transfer of the note to Griffin, without recourse on the Dicksons, entitled the plaintiff to a return of the certificate.

There is some discrepancy in the evidence as to what was said at the time of the assignment of the note, in relation to the certificate.

No witness, however, says that Griffin released or abandoned any rights he had to the certificate. The evidence does show that Griffin, before he purchased the note, was notified that Dicksons held the certificate as collateral for its payment.

In *Parmley v. Down*, 23 Barbour, 463, the Court say: "It is entirely clear, that when a debt is assigned, the assignment carries with it all the collateral securities held by the assignor, for its collection, although they are not mentioned or referred to in the assignment—upon the ground that in such cases the securities are incidents to the debt, which is the principal. Hence when one holds a note or bond against another, secured by mortgage upon real or personal property, and afterward assigns the bond or note, or a judgment recovered upon it, to a third person, without any reference to the mortgage, the assignment of the debt, whether in its original form, or merged in a judgment, carries with it the mortgage. See also *Langdon v. Boel*, 9 Wendell, 80. In this last case, the Court say, if, by special agreement, the security is not to pass to the assignee, then the mortgage is, by such agreement, *ipso facto* extinguished. But in the case at bar, as we have already said, there was no such agreement.

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It seems clear to us that the security passed to the assignee of the note.

It is further urged that the evidence shows that the Dicksons held this certificate as special trustee. This is true, but so does every party, who holds securities as collaterals, to secure the payment of a debt.

At the trial the plaintiff introduced as a witness, David Kemp, who was the husband of plaintiff, and offered to prove by him that plaintiff was the owner of the certificate of stock in controversy—that he, as agent of plaintiff, transacted the business with the Dicksons, plaintiff not being personally present—that before the commencement of this suit, he, as plaintiff's agent, demanded said certificate from the Dickson's, which they refused to surrender, giving no reasons therefor, and that in conversation with them, they said they had sold the said note without recourse, but they had made no sale or transfer of said stock, and had not agreed for any such sale or transfer in the sale and assignment of said note, which was objected to, and the objection was sustained and properly excepted to.

This presents the question whether a husband, when he acts as agent for his wife, in the transaction of her business, is a competent witness for the wife, in a suit by the wife, to prove the transactions of such agency.

We find in the Statute (2 G. & H.) the following clause:

SEC. 240. Husband and wife are incompetent witnesses, for or against each other, and they can not disclose any conversation from one to the other, made during the existence of the marriage relation, whether called as a witness, while that relation exists, or afterward, &c.

This is a plain provision of the statute, and can not be controlled by the rule laid down in *Starkey on Evidence*, on pages 139 to 143. Moreover, the view we have already taken of the law, would render this evidence immaterial.

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It is also urged that the Court erred in permitting Mr. Dickson to testify that he told Griffin's agent, pending the negotiations, and when he purchased the \$1,367.53 note for Griffin, that the Dicksons held the certificate of stock in controversy as collateral for the security of the payment of said note.

We think this was important for the purpose of showing that Griffin had notice that there was such security when he purchased the note.

The judgment is affirmed.

NOTE.—Admissions—Declarations of an assignor, of a personal contract, or chattel, if made while the assignor remained in possession, although after the execution of the assignment, are admissible in evidence to characterize the transaction. 10 *N. Y. Ct. Apps.*, 309. See also 1 *Greenleaf Ev.*, 12th Ed., p. 218, *et seq* and notes.

The admission of distinct facts, during negotiation for a settlement, are always competent evidence against the party making them. *Ct. Apps.* 1864, 1 *Keyes*, 495.

The admission of a party should be received with caution, but the Court will not interfere with the finding of a jury, on such testimony. 2 *N. Y. Leg. Obs.*, 330.

Admissions or declarations are competent evidence against parties where parol evidence of the facts sought to be shown by such would be competent. 46 *Barb.*, 158.

The admissions and declarations of an agent are admissible against his principal only, when they are made at the time of the transaction. 2 *N. Y. Code R.*, 31.

The declarations of an assignor, for the benefit of creditors, made after the assignment, and while in possession of the assigned property, as to the object of the assignment, are admissible against the assignor, and those claiming under the assignment. 10 *N. Y.*, 6 *Seld.*, 309.

Assignments—Vested rights *ad rem*, and *in re*, and possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment. 1 *Peters.*, 193.

Debt—Where collateral security is given to secure the payment of a debt, equity will consider such security a *trust*, created for the better protection of the debt. *Burroughs v. United States*, 2 *Pa.*, 569, *S. P.*; *United States v. Sturges*, 1 *Pa.*, 525.

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Husband and wife—Agency—It makes no difference, at what time the relation of husband and wife commenced, the principle of exclusion being applied in its full extent, wherever the interests of either of them are directly concerned. 1 *Greenleaf Ev.*, 12th Ed., p. 390.

The husband can not be a witness for or against his wife, in a question touching her separate estate, even though there are other parties, in respect of whom he would be competent. *Same*, 393, and see authorities cited.

But where the interest is contingent, and uncertain, he is admissible. *Richardson v. Learned*, 10 *Pick.*, 261. See further *Reeves' Dom. Rel.*, p. 292, and notes.

IN GENERAL TERM.

WOODBURN SARVEN WHEEL COMPANY v. JAMES H. MCKERNAN, Appellant.

Appeal from NEWCOMB, Judge.

Transcript from Justice's Court—Certificate of Justice—Affidavit—Misnomer—Execution, how impeached, sales under, when valid.

A certificate of a Justice of the Peace, that "the foregoing is a true, correct, and complete transcript from my docket, of the proceedings and judgment," complies with the statute.

Such transcript need not set out the summons issued in the cause; it is sufficient, if it sets out the fact that a summons was issued, and shows a return of the same.

Where, in the caption of an affidavit for an execution upon a transcript of a judgment rendered before a Justice of the Peace, the name "Morris" is written for "Morrison," if all the facts are set forth in the body of the affidavit, thus enabling the Clerk to place it on file, and attach it to the transcript upon which it is made—

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Held: That the misnomer in the caption was not such as to mislead any one and render subsequent proceedings and sale void.

A sale under a voidable execution is valid, even to a purchaser, with notice of the facts, where there is no fraud shown.

An execution, at most only voidable, can not be avoided in a collateral suit, by one who is not a party to it. It must be by direct proceedings, by a person in position to impeach its validity.

An affidavit, and execution issued upon it, are admissible in evidence, the former to show authority for the issuance of the execution, and the latter, for the sale under which the purchaser acquires title, as well as to show justification for the party acting under it.

BLAIR, J.—The plaintiff, in her complaint, says that she is the owner in fee simple, and possessed of certain real estate, and that the defendant unjustly claims title to said premises in fee, wherefore the plaintiff asks that the title may be settled and quieted.

The defendant answered by a general denial. The cause was tried at Special Term, and judgment and decree that title was in the plaintiff. The defendant moved for a new trial, which motion was overruled, and appeal granted to General Term.

The real estate in question was conveyed on the 21st day of May, 1862, by the defendant, James H. McKernan and his wife, to one James P. Morrison, and was afterward levied upon, and sold by the Sheriff, on an execution issued on a transcript of a judgment recovered before a Justice of the Peace, W. W. Leathers, Esq., the assignee of the judgment becoming the purchaser, to whom it was conveyed by the Sheriff, on the 15th day of May, 1868, and through whom the plaintiff claims title. The transcript of the judgment before the Justice was filed in the office of the Clerk of the Common Pleas Court, on the 17th day of November, 1866. It appeared in evidence, that on the 21st day of May, 1862, James P. Morrison mortgaged the real estate to the defendant, James H. McKernan and Winslow S. Pierce, and on the 14th day of October, 1864, the mortgage was endorsed by them upon the record, "Fully paid and satisfied." On the

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17th day of June, 1868, a suit having before that time been instituted in the Common Pleas Court of Marion County, by McKernan & Pierce, a decree was rendered finding that the satisfaction of the mortgage on the 14th day of October, 1864, had been entered by mistake, and decreeing a foreclosure of the mortgage. James P. Morrison was the only party made defendant to these proceedings. On this decree the property was afterwards sold by the Sheriff, and conveyance made to the defendant.

On the trial of the cause, the transcript from the Justice of the Peace was offered in evidence by the plaintiff, to the introduction of which the defendant objected, urging in support of the objection, that it did not show the full proceedings, and does not set out the summons issued in the cause.

The form of the docket entry of the judgment, and of the proceedings in the cause, comply with the requirements of the statute, and is even fuller than the form given in the statute, (2 G. & H., p. 614, form 10, and Sec. 18, p. 518, *Ib.*) and the certificate of the Justice is in the usual form. It is true, the judgment was taken by default, but the entry sets out the fact that a summons was issued, and shows the return of the same in full. The case of *Taylor v. McClure et al*, 28 Ind., 39, is a case precisely in point, and decides this question adversely to the defendant.

In the case cited by defendant, *Brown et al v. McKay*, 16 Ind., 484, the transcript professed to set out the judgment, and issuing and the return of an execution *nulla bona*, and the form of the certificate was as follows: "The foregoing is a true and complete transcript of the judgment from my docket," and it was held that the certificate did not cover the proceedings on execution, even if it included the proceedings prior to judgment. The certificate of the Justice in the case under consideration is as follows: "The foregoing is a true, correct, and complete transcript from my docket, of

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the proceedings and judgment," and the case cited does not, therefore, sustain the position of the defendant. We think the transcript was properly allowed in evidence.

The next objection taken was to the introduction, in evidence, of the affidavit of Mr. Leathers, upon which the execution issued. The title of the cause, as stated in the caption of the affidavit, is as follows: "*Robert L. Walpole v. James P. Morris.*" The judgment set out in the transcript is correctly described in the body of the affidavit, and in the execution, and all subsequent proceedings, as shown in the evidence. The certificate of the Justice, showing the issuing of an execution, and the return of the same, is properly entitled, and bears the same date of the affidavit, and they seem to have been filed at the same time with the Clerk, and by the Clerk received and acted upon, as in the case of *Walpole v. James P. Morrison*, and placed on file with, and attached to the transcript in said cause. We can not believe that the misnomer in the caption of the affidavit was such as to mislead any one, or render the subsequent proceedings and sale void.

There is another view of the case, which we deem conclusive. The affidavit is required for the purpose of informing the Clerk that the judgment is unpaid, and, together with the certificate of the Justice, constituted the authority of the Clerk to issue execution, and is analagous to the former proceedings by *scire facias*, and the more recent proceedings to procure execution, after the lapse of five years, and it has been settled that an execution issued after the lapse of the time limited, and without revival can not, for that ground alone, be avoided in a collateral suit by one who was not a party to it—"it is voidable only at the instance of the party against whom it issued, and that until set aside it is a justification for the party acting under it." *Doe v. Harter* 1 Ind., 427, and authorities there cited. A sale under a voidable execution is valid, even to a purchaser with notice

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of the facts, where there is no fraud. *Doe v. Dutton*, 2 Ind., 309. See also upon the same points, *Doe v. Harter*, Ibid, 252.

We can not, therefore, regard the mistake, for such we think it clearly was, of the name in the affidavit material, and it was therefore properly admitted in evidence.

According to the view above taken, the execution was also properly admitted in evidence; for to give the fullest force to the objections of the defendant, it was at most only voidable, and could only be avoided by a direct proceeding, and the defendant is not in a position to avail himself of the defects, if any existed. Having lost his lien, as against the holder of the judgment on the transcript, by the entry of satisfaction of his mortgage upon the records, we see nothing in the proceeding or judgment of which he can complain.

Judgment affirmed.

Dye & Harris, for appellant, cited the following:

A judgment plaintiff purchasing at Sheriff's sale, is chargeable with notice of all irregularities in the sale, and his vendee, with notice of the record. *Piel v. Brayer et al*, 3 Ind., 333.

And the objection may be made in ejectment. *Sherry v. Nick of the Woods*, 1 Ind., 575, and cases cited in the Blackfords.

And if in ejectment, there, by parity of reason, the same objection may be made in a suit to quiet title, which, by statute, is governed by the same rules. 2 *G. & H.*, 284, §§ 611 and 612.

In *Sheldon v. Arnold*, 17 Ind., 166, it is conceded that an affidavit is necessary.

In *Brown v. McKay*, 16 Ind., 484, it is held, a certificate must be filed to warrant the issuing of the execution. And where there was no proper certificate, it is said to have been "improvidently issued, being thus based upon an imperfect record, the sale was thereby rendered invalid."

This seems to be decisive of the case. In this case (16 Ind., 484) the transcript contained the statement of execution, and return, but the certificate only covered the judgment, and it was held as above stated.

That was as much of a "clerical error" as in the case at bar, and no title passed.

See *Williams v. Case*, 14 Ind., 253: that execution is the best evidence,

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yet we claim nothing on these points. We hold this execution was not warranted, and hence no title passed.

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There is great difference between erroneous and irregular (or void) process. The first stands valid, and good, until it is reversed; the latter is an *absolute nullity*, from the beginning, * * and he can not justify under it, because it was his own fault, that it was irregular and void at first. 3. John., (N. Y.), 523; 1 Cowen, on page 735.

The case of *Lewis v. Phillips*, 17 Ind., 108, holds, a Clerk can not issue without plaintiff's direction, &c. But we do not rest this case on that principle. We hold that the execution could not issue until a proper affidavit was filed.

The transcript could only show jurisdiction by the summons, and return, where there was no appearance. 26 Ind., 441

In *Cline v. Gibson*, 23 Ind., 11, the judgment set out that "the defendant had been duly served," &c., but did not set out the summons. The Court held, it did not show that jurisdiction had been acquired.

In 26 Ind., 319, the 23 Ind., 11, is affirmed, *holding* that the introduction of the judgment, without a transcript of the "record of the proceedings," showing jurisdiction, &c., was not sufficient. We hold then:

First, No proper affidavit was filed, and hence the execution was void.

Second, That no proper transcript was filed or introduced in evidence.

Hanna & Kneffler, for appellee.

Sections 539, 540, 541, 2 G. & H., 267, embrace the provisions of the statute upon the transfer of judgments obtained before Justices of the Peace, to the Court of Common Pleas, to make the same liens upon real estate, and also the necessary steps to procure the issuing of executions upon such transferred judgments.

• • • • •

The point attempted to be maintained by appellant is, that the affidavit required by the provision of Section 541, is defective in this, that in the caption it describes "James P. Morris" as judgment defendant, when it should have described "James P. Morrison." We submit, that at most, it can be said, this is a clerical error, and this is in effect cured by the subsequent recital of the facts in said affidavit. The affidavit clearly shows the date, the amount of recovery, etc., the Court before whom rendered, also the filing of said affidavit with the other papers in said cause, transmitted by the Justice to the Clerk of the Court of Common Pleas. It further appears, and it is patent that the mistake referred to did not mislead the Clerk in the issuing of the execution, that the same was issued in the proper cause, and that all proceedings subsequent, the levy, advertisement, sale, and conveyance by Sheriff, were all against "James P. Morrison," and not "Morris."

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The decisions of the Supreme Court in 16 and 17 Indiana have no bearing upon the point involved in this cause. The points held there are applicable to defective *certificates*, and not the affidavit in such proceedings.

The affidavit is the procuring cause for the issuing of an execution upon judgments transferred from Justices of the Peace to the Court of Common Pleas, of the same nature as *præcipe* in ordinary causes. It is the statutory mode provided in such cases.

IN GENERAL TERM.

JOSIAH LOCKE v. DAVID MUNSON, Appellant.

Appeal from RAND, Judge.

Prayer for Specific Performance.

Defendant, as owner of certain "Letters Patent," agreed to convey, and assign to plaintiff, all right, and title in and to said "Letters Patent," together with the ownership of the same for any extension of said Patent, in certain States and Territories, stipulating that plaintiff should pay one-half of the cost, including labor of any extension of Patent, * * if he desires to use said extension. Plaintiff demands conveyance, alleging pro rata payment of expenses.

Defendant answers, *First*, General denial; *Second*, By counter claim "for labor and expenses incurred in procuring extension."

Defense offered in evidence the original assignment of the Patent, by the defendant to the plaintiff, claiming that under this assignment he had already complied with the terms of the agreement to convey.

Held: That assuming it to be true, that this instrument would have shown compliance by defendant with the terms of his agreement, as set out in the bill, it was not admissible under the general issue.

Pleading, when should be special.—All defenses, which admit a sufficient contract, or cause of action, but avoid it by subsequent matter, or show

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that the cause of action has been discharged by payment, or performance, should always be specially alleged in answer.

Answer, should be specific.—The complainant, in a proceeding of this character, has a right to be informed by the answer, not only of the facts to be proved, but of the use intended to be made of them, and of the nature of the conclusions intended to be drawn.

Though it is necessary to allege in the complaint that an agreement sued on has not been performed, this fact need not be proved by the plaintiff.

Exceptions—not taken to conclusions of law, below will not be considered on appeal. See *Carter v. Augusta Gravel Road Co.* *Ante*.

Finding, costs in.—Upon issues joined, where the finding is for both parties, the Court may render separate judgments for costs upon each issue, in favor of each party.

Dye & Harris, for plaintiff.

Morrow & Trusler, for defendant (appellant).

BLAIR, J.—The plaintiff in this case, by his bill, seeks the aid of the Court to compel the specific performance of a contract.

On the 6th day of February, 1866, the defendant being the owner of certain letters patent, of date the 5th day of August, 1856, for an improvement in lightning rods, known as "Munson's Tubular Lightning Rod with Spiral Flanges," made an agreement in writing, with the plaintiff, by which he agreed to convey and assign to the plaintiff, all right and title in and to said letters patent, "together with the ownership of the same for any extension of said patent," in certain States and Territories. In the same agreement, it was stipulated that the plaintiff should pay "one-half of the cost, including labor, of any extension of patent," &c., *
* * if he desires to use such extension.

The bill sets out a copy of the agreement, and alleges that the patent has been extended to the defendant for a period of seven years from the 6th day of August, 1870, and that the defendant now holds said extension, and that the plaintiff desires to use the same, and has so informed the

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defendant, and demanded a conveyance, and that he has paid certain portions of the expenses incurred in procuring the extension, as demanded by the defendant, and he is ready and willing to pay the residue, and tenders the sum of fifty dollars, and prays that an accounting may be had of the expenses, and that on payment of the same the defendant may be compelled to convey, &c.

The defendant filed an answer in two paragraphs; the first, a general denial, and the second, a counter claim for labor and expenses incurred in procuring the extension of the letters patent.

The cause was tried, and the Court rendered a special finding of the facts and conclusions of law; and a decree was entered, requiring the plaintiff to pay into Court, for the defendant, one hundred dollars, and on the payment of the same, the defendant was required to execute a conveyance of the letters patent, as prayed for, &c.

A motion for a new trial was made by the defendant, and overruled by the Court, and the defendant appealed.

The defendant, at the trial, offered in evidence the original assignment of the patent, by the defendant to the plaintiff, dated February 6, 1866, to the introduction of which objection was made, and the evidence was excluded by the Court. This is the first error complained of. It is claimed by the appellant that the conveyance or assignment offered in evidence showed that the defendant had already conveyed the patent right for the time for which the letters were extended, by virtue of the clause in the conveyance or assignment, providing that the plaintiff shall possess the same, "*to the full end of the term for which said letters patent are or may be granted*", and that it was competent evidence to show that the defendant had already complied with the terms of his agreement to convey, and should have been admitted under the issues joined. Assuming it to be true, that the instrument offered in evidence would have shown

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that the defendant had already complied with the terms of his agreement, set out in the complaint, the position of the defendant, that the evidence was admissible under the general issue, is not tenable.

“Every matter of fact which goes to defeat the cause of action, and which the plaintiff is not under the necessity of proving, in order to make out his case, must be alleged in the answer.” *Baker v. Kistler*, 13 Ind., 63; *Hubler v Pullen*, 9 Ind., 273. Although it is usual and necessary to allege in complaints that the debt is due and unpaid, or that an agreement sued on has not been performed, these are facts that need not be proved by the plaintiff.

All defences which admit a sufficient contract or cause of action, but avoid it by subsequent matter, or show that the cause of action has been discharged, by payment or performance, should always be specially alleged in answer. *Van Santvoord's Pleadings*, 469 and 470, *Second Edition*.

The complaint in this case is in the nature of a bill in equity, and the rule in such cases was, that the complainant had a right to be informed by the answer, not only of the facts to be proved, but of the use intended to be made of them, and of the nature of the conclusions intended to be drawn. *Barbour's Chan. Pr.*, 137.

The evidence offered was therefore properly excluded.

The next error assigned is, that the Court erred in finding that the defendant's labor, in procuring the extension of the patent, was only worth two hundred dollars, it being claimed that the evidence showed it to be worth much more. The evidence does not disclose very definitely the amount of labor performed. It seems to have consisted mainly in writing letters, and procuring certain statistics and affidavits, and was of such character as to create much uncertainty in the estimates put upon its value by the witnesses.

There is no glaring deficiency in the amount found by the Court, and it is also true, that it might have been larger,

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without striking one as exorbitant under the evidence, but the rule is not to interfere with findings in such cases, and we see no occasion to vary from the general rule in this case.

The third and fourth error alleged, embrace the same matter as the second, and need not be further noticed.

The fifth error alleged, is in rendering a decree requiring an assignment of the letters patent, and the seventh alleges error in the special finding and conclusions of law. As no exceptions were entered to the conclusions of law, these questions are not properly presented for review. *The City of Logansport v. Wright*, 25 Ind., 512; *Peden, Adm'r, v. King*, 30 Ind., 181; *Carter v. The Augusta Gravel Road Co.*, in this Court.

The defendant filed a motion to tax the costs in the case to plaintiff. The motion was overruled, and the Court ordered one-half of the costs to be taxed to each party. The overruling of the plaintiff's motion is assigned for error. There being two issues joined in the cause, one of which was found for the plaintiff, and one for the defendant on his counter-claim, it was within the power of the Court to render separate judgments for costs upon each issue, in favor of the party recovering. *Sidner v. Spaugh*, 26 Ind., 317; 2 G. & H., Sec. 400, p. 288. We think, therefore, a proper judgment for costs would have been, that the plaintiff recover of the defendant the costs arising upon the issues joined in the complaint, and that the defendant should recover of the plaintiff the costs accrued upon the issues joined in his counter-claim.

The judgment is therefore affirmed as to all things except costs, the judgment for which is modified, to conform to this opinion.

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IN GENERAL TERM.

JULIA BRENNAN and PATRICK BRENNAN v. JEDRO LUCKLEAR.

Appeal from BLAIR, Judge.

Appeal—Statutory exceptions to rule in—Restraining order.

An appeal does not lie from an order setting aside a temporary restraining order.

*Wallace — Heller, for appellee.**Test, Burns & Wright, for appellants.*

NEWCOMB, J.—The plaintiffs appealed from an order made by Judge Blair, setting aside a restraining order made by him on the *ex parte* application of plaintiffs, before the time had expired for which the restraining order had been granted. The defendant has interposed a motion to dismiss the appeal, on the ground that the order was not one from which an appeal lies to the General Term.

The 25th Section of the Act organizing this Court, provides for an appeal to the General Term from the decision of a single Judge, and those cases only, where, if the decision complained of had been rendered by the Circuit Court, an appeal would lie from that tribunal to the Supreme Court.

It is a general rule of practice that an appeal does not lie from an inferior to the Supreme Court, except from a final judgment of such inferior court. The only exceptions to this rule are made by the statute.

Among those excepted cases is an interlocutory order, "granting, or dissolving, or overruling motions to dissolve an injunction *in term*, and *granting* an injunction *in vacation*."

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2 G. & H., 277, Sec. 576. It seems to me a clear proposition, that this appeal does not come within the above exceptions to the general rule, that an appeal lie only from a final judgment.

The restraining order was not an injustice, consequently the defendant could not have appealed from that order, vide *Cincinnati & Chicago R. R. Co. v. Huncheon and another*, 16 Ind., 436.

The order dissolving the restraining order was not appealable for two reasons: *First*, it was not the dissolution of *an injunction*, for no injunction had been granted. *Second*, The order was not made *in term*, but in *vacation*.

The case does not come within any exception laid down in the statute, and we have no power to legislate to cover such cases.

The defendant's motion is therefore well taken, and the appeal must be dismissed.

IN SPECIAL TERM

LEVI SOHL *et al* v. JAMES C. GEISENDORF *et al*.

Application for injunction for infringement of Trade Mark.

A party purchasing part of a trade mark, and adopting the balance, will be protected in his title to the former, as well as the latter.

The use of some word, letter, or character, of a trade mark, by different parties, without hindrance, will not work an abandonment by him in whom its right of use, and title is vested.

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A trade mark composed of such devices as denote simply, quality of an article, will be protected, especially if it is once established.

It is an infringement of a trade mark, even though the imitation and original, when placed side by side, would not mislead, if the similarity is such that a difference would not be noticed when seen at different times or places.

Gordon, Browne & Lamb, for plaintiffs.

Taylor, Mitchell & Ketcham, for defendants.

RAND, J.—This is an application for an injunction, enjoining the defendants from using a trade mark, which plaintiffs claim belongs to them.

It appears from the affidavits filed, that in 1859 James L. & Walter N. Evans were partners and millers at Noblesville, and employed one Roberts, of New York city, to get them up a brand or trade mark with which to mark a certain grade of flour which they manufactured. Roberts got up one, some of the distinctive features of which were the words, "White Rose Mills," "Snowflake," a double row, and the word "Family"—and perhaps "Flour"—which the Evans adopted and used until they sold out their mill, in 1861, to Nathan Sohl and John L. Wild, and transferred to them said mill and its appurtenances, including the said trade mark or brand.

Nathan Sohl and Wild carried on said mill, and used said trade mark, and afterwards sold an interest in the mill and business to Levi Sohl, and the business was carried on in the name of Sohl, Wild & Co., who continued to use said brand or trade mark.

In 1864 said firm of Sohl, Wild & Co., purchased a mill in Indianapolis, and continued to run both mills, using said mark or brand at both. About this time Alfred I. Sohl became a partner, and at this time, or perhaps some time previously, the trade mark was added to or changed, so as to appear as the exhibit, filed with the complaint, marked "A,"

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except the firm name was afterward changed as hereinafter stated. David Gibson also became a member of the firm; Nathan Sohl sold out his interest and withdrew; the firm name was changed to Sohl, Gibson & Co.; their name, "Sohl, Gibson & Co." was inserted in the brand or trade mark, in place of the old firm name, and said last mentioned firm have continued to use the said brand or trade mark ever since. In 1870 they sold the mill, in Noblesville, back to the Evans, but they have continued to run the mill, and use said brand or trade mark at Indianapolis, and are still doing so.

The defendants have a mill at Indianapolis, and are using the brand or trade mark "B," exhibited in the complaint, upon their flour, and are selling the flour throughout the country.

The defendants resist the application for an injunction upon the following grounds:

First, That plaintiffs never had an exclusive right to the trade mark they use—in fact never owned it.

Second, If plaintiffs ever owned said trade mark, and had an exclusive right to it, they have abandoned such exclusive right by permitting other parties to use it.

Third, That said plaintiffs' trade mark is composed of such letters, words, or characters as denote the quality of the article to which they are affixed, and therefore can not be the subject of an exclusive trade mark.

Fourth, That defendants obtained from Nathan Sohl, one of the former proprietors of said trade mark, the right to use it.

Fifth, That there is such a dissimilarity between the trade mark of plaintiffs, and the one used by defendants, as to be no infringement of plaintiffs' mark.

We will briefly notice these several propositions in their order:

First, As to plaintiffs' exclusive right. It appears from the

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affidavits on file, that, at least a part of said trade mark was used by the Evans in 1860; that it was transferred to their successors in the mill property and business in 1861, and has been handed down, or transferred to the several firms that have succeeded the Evans, until about 1864, when the trade mark now in use, and made exhibit "A" in plaintiffs' complaint, was adopted and used by plaintiffs under the different firm names which have succeeded each other. Each firm appears to have succeeded to the rights of its predecessor. The authorities establish the proposition that a trade mark may be devised and adopted by the party himself, or he may acquire it by purchase from his predecessor. The mode by purchase is as effectual as any other, and Courts will go as far to protect such trade mark as if the party devised and adopted it. I hold that the plaintiffs have shown a good title to the trade mark they use, if it should be held a trade mark at all. I know of no reason why a party can not purchase a part of a trade mark and *devise* and adopt the balance.

See *Millington v. Fox*, 3 Myl. and Cr.; *The Joseph Dixon Crucible Co., v. Meyr Gagginhien*, 3 American Law Terms, 288; *Craft v. Day*, 7 Beavan, 84; *Tilly v. Fasset*, 17 American Law Reg., 402; *Coffin v. Branton*, 4 McLean, 516.

Second, As to plaintiffs having abandoned the mark. There is no evidence showing that other persons, than the plaintiffs, their predecessors, and the defendants, have used the plaintiffs' trade mark in its present or previous forms, unless the Evans did after they bought back the Noblesville mill in 1870, and if they did, it was without the plaintiffs' consent, and at their request the Evans abandoned its use.

It is true that there is evidence that different parties have used at various times, some word, letter, or character, which composed the plaintiffs' entire mark; but I do not think this is sufficient to establish an abandonment of their mark by plaintiffs. Many of the authorities hold that the defense

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that others have pirated the same mark, is only an aggravation of the offence.

Third, As to the mark indicating quality, and therefore not entitled to protection. I find some authorities that hold that there can be no exclusive right to a trade mark, which only denotes the quality of the article manufactured. I believe, however, the weight of authority is the other way. The later, and it seems to me the better authorities, establish the proposition that a trade mark may be composed in part, if not entirely, of words, letters, and characters, that denote the quality of the article.

If a trade mark is once established, I hold, whatever its design, it will, to some extent, necessarily indicate to the public the quality of the article. But if I am mistaken in this, still I am of opinion that the plaintiffs' trade mark does designate much more than the simple quality, or quantity of the flour in the barrel, and therefore is entitled to protection from infringement.

See *Clark v. Clark*, 25 Barbour, 76; also 416; 47 Barbour, 455; *Sexion v. Provigendo*, 1 Ch., Appeal Cases; *Coats v. Holbrook*, 2 Sanford's Ch. Reports, 586, and notes and authorities cited.

Fourth, As to the defendants' claim of right under Nathan Sohl. The defendants claim to have obtained, from Nathan Sohl, one of the former proprietors, the right to use the plaintiffs' trade mark. Nathan Sohl had sold out his right to said trade mark to his partners, before the defendants claim to have obtained the right from him. He could not confer on the defendants a title he had previously parted with. This is too plain for argument, or to need authority.

Fifth, As to the similarity of the two marks. The exhibits of plaintiffs' and defendants' trade mark, set out in the complaint as exhibits "A" and "B," have certainly a striking resemblance, and in the opinion of the Court, the defendants' is well calculated to deceive the general purchaser, who

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might be seeking the plaintiffs' brand of flour. If the two marks were seen at different times or places, a majority of purchasers would not distinguish the one from the other, unless their attention was specially called to the difference. If such be the case, the law is well settled, that the defendants' trade mark is an infringement of the plaintiffs', even if the marks, side by side, would not mislead. But these two trade marks, when placed side by side, would mislead many, if not a majority, of purchasers.

It is the opinion of the Court, that the similarity of the two marks is so great that defendants' is a palpable infringement of plaintiffs'.

Clark v. Clark, 25 Barbour, 76; *Brooklyn Company v. Maury*, 25 Barbour, 416; *Eddleson v. Vich*, 23 Eng. Law and Equity Reports; *Amoskeag Co. v. Sprears*, 2 Sanford Superior Ct. Reports, 599; *The Joseph Dixon Crucible Co. v. Meyr Gagginkien, et al*, 3 American Law Tirms, 288, and authorities there cited; *Sexio v. Provigendo*, 1 Ch. Appeal Cases, 191; *Coats v. Holbrook*, 2 Sanford's Ch. Reports, 584, and the cases there cited.

Upon the plaintiffs executing the proper bond, the following order will be entered:

It is therefore considered by the Court, that the defendants, and each of them be enjoined, until the final hearing of this cause, or the further order of the Court, from using or permitting their employes to use, the trade mark *indicated* by exhibit "B," in plaintiffs' complaints, and heretofore used by them, or any mark of like similitude.

NOTE.—Perpetual injunction was granted against defendants, at the following May Term, and judgment rendered against them for damages and costs.—REF.

NOTE.—No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar, or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either

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that he is that person, or that he is connected with, and selling the manufacture of such other person, while he is really selling his own." *Hilliard on Injunction*, tit., *Trade Marks*, 490, 2d Ed.

"An injunction will be granted, if purchasers using ordinary care are liable to be misled, though not if the two trade marks were seen side by side." *Same*, 491, *et seq.*

"There must be, between the genuine and fictitious marks, such general similarity, or resemblance of form, color, symbols, and such identity of words and their arrangement, as to have a direct tendency to mislead buyers, who exercise the usual amount of prudence, and caution. *Same* 493, *et seq.* See also in *Craft v. Day*, 7 *Beavan*, 88, and in *Partridge v. Menck*, 2 *Sandf. Ch.*, 624.

"The right to a trade mark, may in general, treating it as property, or as an accessory of property, be sold, and transferred upon a sale, and transfer of the manufactory of the goods, on which the mark has been issued, to be affixed, and may be lawfully used by the purchaser," * * * * *
and if they "continue to use the original name as a trade mark, they will be protected against any infringement of the exclusive right to that mark." *

"The question in every such case must be, whether the purchaser, in continuing the use of the original trade mark, would, according to the ordinary usages of trade, be understood as saying more than, that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such case I see nothing to make it improper for the purchaser to use the old trade mark, as the marks would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased." 11 *House of Lords' Cases*, 533, 534.

For the infringement of a trade mark, the plaintiff is entitled to nominal damages, without proof that he has been deprived of any particular amount of profits by the defendant's unlawful act. *Burnet v. Phalon*, 21 *Howard Pr.*, 100; *Blofeld v. Payne*, 4 *B. & Ad.*, 410.

But, "in practice, the plaintiff's remedy lies rather in the equitable 'security for the future,' than the legal 'indemnity for the past,' afforded by the Courts, as no definite rule seems to exist for the ascertainment of the extent of the actual damage." *Sedgwick on Damages*, 675, n.

In England, however, "it is held that the Court will only direct an account of the 'profits made by the defendants by means of the infringement,' and not of those of which the plaintiff has been deprived. See *Elwood v. Christy*, 18, *C B. (N. S.)*, 494.

The jury may give vindictive damages, if the defendant is sued the second time. 1 *Story*, 336. See also 16 *Howard*, 480, 489; 1 *Blutckford*, *C. C. R.*, 244.

"If the mark used by the defendant bears such a resemblance to the plaintiff's trade mark, though not an exact copy, as is calculated to mislead

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the public generally, who are purchasers of the article, and to make it pass with them for the one sold by him, it is an infringement." 4 *McLean*, 516; see also *Brightley's Fed. Digest*, tit. "Trade Marks," 831.

The appropriation of any prominent, essential, or vital feature of a trade mark by another, is an infringement. If the trade mark is simulated in such manner as probably to deceive customers, the piracy may be checked by injunction. *Filley v. Fossett*, *Supreme Court of Mo.*, 1869, 4 *McLean*, 519; 2 *Barb. Ch.*, 103.

It is not requisite that the whole should be pirated, nor to show that any one has in fact been deceived. 2 *Sand. S. C.*, 607; 25 *Barb.* 79; 2 *Sand. Ch.*, 597. See 8 *Am. Law Reg. N. S.*, 402, and authorities cited to case. See *Upton* on "Trade Marks."

 IN GENERAL TERM.

JOHN A. DEFORD, Appellant, v. JOHN F. C. URBAIN.

Contract, rescision of—Agreement, performance of.

Where an agreement contains no specified time for its performance, its execution must be within a reasonable time. Failing to carry out its provisions, to entitle either party to recovery for breach, a tender must be made of the consideration, on the one part, or demand for the performance of the contract on the other.

A party who seeks to rescind a contract, must return, or offer to return, whatever consideration he has received on the contract, or at least put the parties *in statu quo*, as nearly as the fraud, of the opposite party will permit.

The provisions of Sec 25, of the Act creating the Superior Court, in the determination of cases in the General Term, gives a discretionary power to enter, affirm, reverse, or modify the decision made in Special Term, and accordingly the Court in General Term, may settle the rights

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of the parties, on appeal, by a discretionary order to the Judge, before whom the case was heard in Special Term.

Heller — Taylors, for appellant.

Mitchell & Ketcham, for appellee.

RAND, J.—This was a suit in replevin for a portable saw mill, brought by plaintiff against defendant, in which he alleges that he is the owner, and entitled to the possession.

Defendant filed an amended answer in paragraphs numbered 2d, 3d, 4th and 5th.

There was a demurrer sustained to 2d, and one overruled as to 3d, and reply of general denial to 3d, 4th and 5th, and a trial and verdict on the issues raised by these paragraphs for defendant, and judgment for return of the property to defendant was rendered over plaintiffs' motion for new trial; exceptions were taken; the evidence is made part of record. Plaintiff appeals to General Term, and assigns for error the overruling of demurrer to 3d paragraph of answer, and also error in overruling motion for new trial.

The *third* paragraph alleges that plaintiff's sole claim to the portable saw mill is under and by virtue of a certain written contract, which is made part of the paragraph, and that plaintiff has failed and refused to carry out his part of said pretended contract, and he says that there is a total failure of consideration to the defendant.

Said written contract reads as follows:

"Articles of agreement made and entered into this 28th day of March, 1871, between John F. C. Urbain, of Marion County, Indiana, of the first part and John A. DeFord, of Marion County, Indiana, of the second part.

"Witnesseth that the party of the first part, for and in consideration of eighty acres of land situated in the County of Newton, State of Indiana, and three hundred dollars, has this day sold his steam circular saw mill in Lawrence town-

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ship, Marion County, Ind., and the appurtenances thereunto belonging, and in consideration of the above, the party of the second part agrees to give a good and sufficient warrantee deed to eighty acres of land in Newton County, Ind., and pay the sum of two hundred dollars in cash, and one hundred dollars on the 1st of September, 1871, with 10 per cent. interest from the date of this agreement. Witness our hands and seals this 28th day of March 1871.

J. F. C. URBAIN.

JOHN A. DEFORD.²

It will be observed that no time is specified when the mill is to be delivered, or the deed for the 80 acres of land made, and the \$200 in cash paid.

According to well settled principles, such a contract, if not immediately performed, must be in a reasonable time, and the act of delivering the saw mill, and the delivery of the deed for the 80 acres, and the payment of the \$200 in cash, are concurrent acts.

It seems to us if the plaintiff had failed to perform his part of the contract, he was in no condition, without first tendering a performance on his part, to demand a delivery of the mill. We think the *third* paragraph of the answer was a bar to the plaintiff's recovery, and the demurrer was properly overruled.

The *fourth* paragraph of the answer sets out that the only claim plaintiff has to said saw mill is under the said written contract, and that plaintiff fraudulently represented that he had good title to the 80 acres of land in Newton County, was the owner in fee-simple, and that it was free from incumbrances, and defendant relying on said representations, executed said contract, when in fact plaintiff had no title whatever, at the time or since, to said 80 acres, and plaintiff's representations were wholly false and fraudulent.

The *fifth* paragraph of the answer alleges that plaintiff claims title to said saw mill by and under said contract, and

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that said contract was obtained through fraud in this, that plaintiff represented that said 80 acres of land was well suited for agricultural, and farming purposes, when in truth it was not suitable for such purposes, and is almost entirely covered with water, and not fit for any purpose whatever, and what is not covered with water is a swamp, and defendant relying upon said representations, entered into said written contract.

On the trial of these issues, it was proved that Jacob P. Dunn had contracted to convey to a certain Gravel Road Company 80 acres of land in Newton County, and said Company had agreed to convey to plaintiff, 80 acres of Newton County land, and by agreement between Dunn, said Company, plaintiff and defendant, that Dunn should convey to defendant 80 acres of land in Newton County, in fulfillment of DeFord's agreement to convey 80 acres to defendant, and therefore Dunn and wife made defendant a warrantee deed, which defendant accepted, in fulfillment of that much of DeFord's contract with him, and at defendant's request, Dunn sent the deed to Newton County, and had it recorded for defendant. It also satisfactorily appears that before the bringing of this suit, that plaintiff tendered defendant the \$200 cash, mentioned in the contract, and demanded possession of the saw mill.

It appears, as well as shown by the evidence, that Dunn never had any title to said 80 acres conveyed by him to defendant, and also that the land is worthless for farming purposes, that its market value is \$1.00 per acre, and that Urbain never took actual possession of it.

There is no evidence that defendant at any time tendered a reconveyance of said 80 acres to either Dunn, the said Company, or plaintiff, and we are satisfied that the verdict is right, unless it was necessary that defendant should have made such tender

The motion for a new trial is for three causes—

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First, The verdict of the jury is not supported by the evidence.

Second, That the charge of the Court to the jury was contrary to law.

Third, The Court erred in admitting improper evidence, which was excepted to at the time.

There has been no error urged, or pointed out under this last specification, and we shall not consider it further.

In order to dispose of the other two causes for a new trial, it will be necessary to determine whether Urbain, before he could successfully resist plaintiff's suit for possession of the saw mill, should have tendered a reconveyance of the 80 acres to either Dunn, or DeFord.

DeFord's suit was in the nature of an action for specific performance of the contract, and Urbain was seeking a rescision of the same.

DeFord had undertaken to perform that part of the contract which bound him to make a good and sufficient deed to 80 acres of land in Newton County, and had performed it in such a manner that Urbain had accepted a conveyance from Dunn in full discharge of that part of the contract. But it turns out that Dunn had no title to the land he conveyed to Urbain, and that the land was worthless for agricultural, or farming purposes.

Defendant had an election, either to tender a reconveyance of the land, and rescind the contract, or he could stand by the contract, and sue upon Dunn's warrantee in this deed, so far as the defense of want of title is concerned.

If defendant can successfully defend this suit without tendering a reconveyance to plaintiff, or Dunn, he succeeds in rescinding the contract. DeFord could not at this late day tender him a deed for another 80 acres of Newton County land, and then force Urbain to execute the contract.

He still holds Dunn's warrantee deed for the 80 acres of

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land, and if the verdict and judgment stand, the contract is rescinded.

It is urged that he could not recover against Dunn upon the warrantee if he rescinded the contract. This may be true. But how is DeFord to have his remedy over against the Gravel Road Company, and that Company against Dunn. Dunn might well say: By agreement with you all, I conveyed to Urbain by warrantee deed, and so long as that warrantee is out, I will not convey to you that, or other land.

It is a well settled rule in equity, that a party who seeks to rescind a contract, must return, or offer to return, whatever he has received on the contract, or at least put the parties *in statu quo*, as nearly as the fraud of the opposite party will permit. *Mason v. Bovet*, 1 Denio, 69.

We think the Judge trying the case should, before he rendered judgment for the return of the saw mill to defendant, request him to execute and file in this cause a deed of quit claim to plaintiff, for the 80 acres of Newton County land, conveyed to defendant by Dunn, and upon his failure to do so, that a new trial should have been granted.

A portion of the 25th Section of the Act, creating this Court, reads as follows:

"The appeal shall be heard and considered in the General Term, upon the original papers and records filed, and made in the cause at the Special Term, and such matters as are properly made part thereof by bill of exceptions; it may affirm or reverse the judgment of the Special Term, or modify it, or render such judgment as may be deemed proper. It shall, if the judgment of the Special Term is not affirmed, enter of record the error, or errors found there, and remand said cause to the Special Term, with instructions as to said error, or errors, and the Special Term shall carry into effect the instructions of the General Term."

Under these provisions of the law, organizing this Court,

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we think we have full power to settle the rights of the parties herein, according to the rules and principles of equity.

The cause is therefore reversed, back to, and including the rendition of the judgment, and the Judge at Special Term is directed to enter an order requiring defendant to execute a deed of quit claim to plaintiff, for the 80 acres of Newton County land aforesaid, in which defendant's wife, if he has one, must join, within twenty days from the entering of such order, and place the same on file in this suit, for the benefit, and acceptance of plaintiff, and upon his complying with such order, the Judge at Special Term is then directed to enter judgment, on the verdict of the jury, in conformity to law, and upon said defendant's failing to do so, then the Judge at Special Term is ordered to grant plaintiff a new trial.

Plaintiff is decreed costs in General Term.

NOTE.—A party can not repudiate a contract on the ground of fraud, and at the same time retain the benefits derived from it, but must, when he discovers the fraud, restore, or offer to restore, to the other party, what he received. Failing to do this, he affirms the contract. 17 *Ind.*, 183.

The election on the part of the defrauded party to rescind the contract, (the consideration, a note), must be exercised as soon as the fraud is discovered, and if after the fraud practiced upon him has come to his knowledge, *he deals with the subject matter of the contract*, he can not repudiate the contract, although he subsequently discovers further circumstances connected with the same fraud. *Chitty on Contracts*, 680.

When a contract stipulates for the conveyance of lands, or estate, or for a title to it, performance can be made only by the conveyance of a good title, and when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed, or conveyance as the contract describes, however defective the title may be. *Hill v. Hobart*, 15 *Maine*, 164; *Lawrence v. Dale*, 11 *Vermont*, 549; 22 *Pick.*, 166.

A contract to make, and execute "a good and sufficient deed to convey the title to said premises," is not performed unless a good title to the land passes by the deed. *Same*: *Pugh v. Chesseldine*, 11 *Ohio*, 109; *Tinney v. Ashley*, 15 *Pick.*, 546; *Smith v. Haynes*, 9 *Greenl.*, 128; *Tremaine v. Lining*, *Wright*, 644; *Bacon v. Gammon*, 14 *Maine*, 276.

The party must be able to convey such a title as the other party had a right to expect. 11 *Vermont*, 549.

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If a contract, or order, under which goods are to be furnished, does not specify any time at which they are to be delivered, the law implies a contract, that they are to be delivered within a reasonable time, and no evidence will be admitted to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument. *Crocker v. Franklin Hemp and Flax Manufacturing Co.*, 2 Sumner, 530.

What is a reasonable time, within which a contract is to be performed, where the contract is silent on the subject, is a question of law. 2 *Greenl.*, 249; 15 *Maine*, 350; 16 *Maine*, 164. And it is to be determined by a view of all the circumstances of the case. 3 *Sumner*, 530; 3 *Johas. CA.*, 23; 3 *Penn.*, 445; 22 *Pick.*, 546.

A person is not bound to perform an agreement on Sunday. 1 *Cowen*, 75, and *Chitty on Contracts*, 738, n., and *et seq.*

Where no time is fixed in the contract, or by other agreement between the parties, either express, or implied, for the doing of a thing, a request is essential to the cause of action. 24 *Vermont*, 660.

"Where the acts to be done by each party, are to occur at the same period, neither party can sue on the contract, without showing that he was ready, and willing to perform his part thereof." *Chitty on Con.*, 746; 1 *Cushing*, 279; 3 *Wend.*, 356; 3 *Rand.*, 71.

A party can not rescind a contract, and at the same time retain the consideration in whole, or in part, which he has received under it. *Jennings v. Gage*, 13 *Illinois*, 610; 1 *Metcalf*, 550.

"If the rescinding of a contract has been brought about by the intentional misrepresentations of one of the parties to it, the contract will still bind the party who has deceived the other as to any damage that may ensue to the latter in consequence of the *mala fides*." *Bruce v. Euler*, 2 *Man & Ryland's Reports*, K. B., 3.

Snesghan *et al* v. Briggs *et al*.

IN GENERAL TERM

CAROLINE M. SNEAGHAN *et al* v. ERASTUS M. BRIGGS *et al*,
Appellants.

Appeal from NEWCOMB, Judge.

Contract, breach of—Pleading—Practice.

In an action for breach of contract, a party suffering default may afterward be permitted to dispute the amount of damages only, but he is estopped from introducing evidence which might otherwise be good under a general denial.

All matters of defense, except the mere denial of the facts alleged by the plaintiff, must be pleaded specially.

If, after default, counsel defending are present at the introduction of evidence, and cross-examine witnesses, and no motion is interposed to place the parties in a position to present a defense, and a finding is made by the Court, it is then too late for a motion to set aside such default and finding.

Such appearance will cure any defect in service of process.

Voss & Davis, for appellants.

Test, Burns & Wright, for appellees.

BLAIR, J.—The plaintiffs brought this suit to recover of the defendants, on account of their failure to use good materials, and perform the labor in a workmanlike manner, in the construction of a house which the defendants built for the plaintiffs. The contract between the parties for the building of the house was in writing, and was made a part of the complaint.

The cause was commenced on the 28th day of April, 1871, and the summons was served on the 29th day of April, "by

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reading and delivering a copy to William G. Briggs, and leaving a copy at the last, and usual place of residence of Erastus M. Briggs," as is shown by the Sheriff's return.

On the 7th day of June, being the third day of the June Term, the defendants were defaulted.

On the 14th day of June the cause was submitted to the Court at Special Term, for the assessment of damages. It seems from the record, that attorneys for the defendant were present at the trial, and were permitted to cross-examine the witnesses introduced by the plaintiff; and at the conclusion of the plaintiff's testimony, the defendants called William Briggs, one of the defendants, as a witness, and propounded to him the following question: "What kind of lumber was used by you in plaintiff's house?" To this question the Court sustained an objection, made by plaintiff, and the witness was not permitted to answer.

One of the allegations contained in the complaint is, that the lumber used in building the house "was rotten, and of an inferior quality, and unfitted for such use." This was a material allegation of the complaint, and the defendants not only failed to specifically contravert it by answer, but further admitted its truth by suffering a default. After default it is error to allow all evidence to be introduced which might be good if a general denial had been filed. *Stephens v. Pell*, 2 Dowl., P. C., 629. All that the defendants would, in such case, be allowed to dispute, taking the breaches of the contract properly alleged in the complaint as true, would be the amount of the plaintiff's damages. *De Gaellon v. L' Aaigle*, 1 B. & P., 368; Saunders on Pleading, and Ev., 2 Vol., p. 218.

The evidence was therefore rightly excluded.

The same witness was then asked three other questions, as follows, viz:

"What specific directions did plaintiff give you about the construction of the house, that were not mentioned in the contract?"

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Second, What changes did she order in relation to the stairway?"

Third, "By whose direction was the stairway placed outside instead of inside the house?"

To these questions, objections of the plaintiff were sustained, and the witness was not permitted to answer.

It is only necessary to observe, that if the defendant relied on any change in the terms of the contract sued on, subsequent to its execution, by which they were relieved from their obligation to perform the labor in a workmanlike manner, or by which they were allowed to use defective materials, these would have been proper matters to have set up in answer. "All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." 2 G. & H., p. 93, Sec. 66.

By the first question, the defendants would seem to be seeking for facts outside of the contract sued on, by which they might avoid the breaches alleged in the complaint. The second, and third questions indicate an intention to show that the terms of the contract, with reference to the stairway, was changed at the instance of the plaintiffs. To have admitted such evidence after the default would clearly have been error.

After the Court had assessed the damages of the plaintiff at two hundred dollars, the defendants filed a motion, and affidavits to set aside the default, and finding. This motion was overruled by the Court, to which the defendants excepted. The affidavit is made by each of the defendants, and Erastus M. Briggs says, "that no notice whatever, of the pendency of this case, was ever served upon him, and that he had no notice of it until the morning the case was tried." The statute provides expressly for the kind of service which the return of the Sheriff shows was made upon Erastus, and he does not show in his affidavit that he had no residence where a copy could be left, so as to constitute

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a good service. William Briggs admits notice, and says he intended to have notified Erastus, but "forgot to do so." He further says, that since the service of the summons he "has been working out of the city," and then goes on to relate a conversation had with one of the plaintiffs before the suit was brought, in which she only claimed some thirty dollars as damages, and said if the defendants would pay that she would be satisfied, and he says that, "owing to the trifling character of her demand, he did not give the matter much attention."

The affidavit, so far from showing any excuse for the neglect to appear and answer, actually shows negligence. Even Erastus, notwithstanding William's forgetfulness, found out that the case was for trial on the morning it was to be tried, and attorneys were employed, who were present at the introduction of the evidence, and cross-examined the witnesses, and no motion was interposed to place the parties in a position to present any defense until after the damages were assessed by the Court. This of itself showed negligence in suffering the Court to go through with the labors of a trial, and after finding the opinion of the Court adverse to them, seeking to place themselves in a position to make defense.

In addition to the negligence shown in the affidavit, it fails to disclose anything that would defeat the claim of the plaintiffs. The defense claimed in the affidavit is but partial.

We think the motion was correctly overruled.

A motion for a new trial was then made by the defendants, and some seven reasons filed in support of the same. We doubt the defendants being in a position to have presented this motion, but the reasons for a new trial assigned in the motion, raise the same questions, with the exception of the first and second, which we have already decided adversely to the defendants.

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On the first and second reasons for a new trial, we believe the finding of the Court is fully sustained by the law and the evidence.

The motion was therefore rightly overruled.

The judgment of the Special Term is therefore affirmed.

NOTE.—Every material allegation of the complaint, and answer not denied, is for the purposes of the action, taken as true. *See 2 G. & H., Sec. 74, and authorities cited thereto.*

Where a default has been regularly taken, the Court is not authorized to set it aside, unless the defendant shows affirmatively, that he has a meritorious defense to the action—15 *Ind.*, 183—and the nature of such defense must be distinctly stated in writing, and verified by affidavit. *Same*, 139.

It is not enough for a party applying to have a judgment set aside, to allege that he was unable to attend, and make his defense, without showing the nature, or cause of such inability. *Same*.

In the absence of contrary proof the appellate Court will presume, that the Court below, when it ordered the default, was fully satisfied by evidence, that the process was regularly served—*Same* 183. An appearance is equivalent to a personal service of the summons. 5 *Sand.*, 423.

An affidavit of a good and substantial defense in the cause, is a sufficient affidavit of merits. 3 *Johns.*, 449. *See also* 5 *Johns.*, 360. *But see for qualification*, 5 *How.*, 233, 238.

An affidavit of defendant's attorney is not sufficient. 8 *Johns.*, 258; *see also* 4 *Hill*, 61.

On an application to set aside a regular default, the defendant must disclose his defense. 1 *Barb. Ch.*, 173.

A default will not be opened to let in a technical defense, or to enable a party to raise technical objections. 6 *Paige*, 571; 3 *do.*, 573; 8 *do.*, 197; 10 *do.*, 369.

Any matter which can properly mitigate damages, may be shown on the assessment of damages on a default to answer. 12 *Howard*, 342.

Stout v. Indianapolis & St. Louis Railroad Company.

IN GENERAL TERM.

PETER STOUT v. INDIANAPOLIS & ST. LOUIS RAILROAD
COMPANY, Appellant.

Appeal from BLAIR, Judge.

Railroad—Highway crossing—Negligence.

Where a person approaches a line of railroad, that for some distance is to be seen from, and in direction of a highway, which he is traveling, and the railroad crosses, and such person fails to use all reasonable means to ascertain whether a train is near, or that it would be safe to cross the track without stopping to look, and investigate the probabilities of danger, and goes upon the track, and is injured by a passing train, he is guilty of negligence, and can not recover damages.

An answer to a question collateral to the issue can not be contradicted by the interrogating party—it is conclusive against him.

Barbour & Jacobs, for appellee.

M. S. Osborne, for appellant.

RAND, J.—This was a suit brought by Stout against the Railroad Company, in which he alleges that he was crossing defendant's track in a two-horse wagon, where it crosses the public highway, called the Rockville Road, and that the defendant's servants carelessly, and negligently run a locomotive and train over plaintiff's horses and wagon, and greatly injured him, and that plaintiff did not by his own carelessness, or negligence, contribute to the injury.

The defendant denied the allegations of the complaint.

There was a trial at Special Term, and verdict for plaintiff for \$3,000, and motion for new trial, which was overruled,

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and excepted to, and bill of exceptions setting out the evidence in the case.

It appears from the evidence that the plaintiff was traveling along a public highway, called the Rockville Road, in Marion County, in a two-horse wagon, and as he drove across the defendant's track where it crosses said Rockville Road, the defendant's train, consisting of a locomotive and cars, coming from the West, ran into the plaintiff's horses and wagon, destroying the wagon, killing one of the horses, and seriously injuring the plaintiff. The Rockville Road branches from the National Road a quarter of a mile east of where defendant's track crosses the former road. Plaintiff was traveling west from the National Road along the Rockville Road, to said railroad crossing, and defendant's track was in view most of the way for a mile west from *said point* of the Rockville Road, which plaintiff was traveling, until he came within about one hundred feet of defendant's track, and then the view of the track was obstructed from plaintiff until he got within thirty feet of the track, and then it could be seen about a *quarter of a mile west*.

If plaintiff had used proper diligence in looking out for passing trains, he could, until he arrived within one hundred feet of the crossing, have seen the train coming for at least a mile, and after he had got within thirty feet of the track, he could have seen it about a quarter of a mile. If he did not look out for the train, and attempted to cross, it was negligence on his part—and if he saw the train coming, and attempted to cross immediately in front of it—this was also grosser negligence, and he must take the consequences of his own rashness. We may add here that there is no evidence that defendant's train was willingly, or wilfully run upon the plaintiff's team and wagon.

The defendant asked the Court to give fourteen written instructions, all of which were refused, and properly excepted to.

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The Court charged the jury, and most of the instructions asked by defendant were given to the jury in substance, if not in form. As to some of the others, this Court is divided in opinion, as to whether they should have been given, but we are unanimously of opinion that the third instruction asked by defendant should have been given to the jury.

This instruction reads as follows :

Third, If you find that the plaintiff did not, before attempting to cross the railroad, endeavor to ascertain whether a train was near, by looking up and down the track, or by using all reasonable means to ascertain whether it it would be safe to cross the track, and he went upon the track without investigating, or stopping beforehand, then the plaintiff would be guilty of negligence, and could not recover."

This *instruction*, we think, states a correct principle of law, and is applicable to the case at bar. No instruction was given to the jury which so clearly and fully expressed this principle. See *The Bellefontaine Railroad Company v. Hunter*, 33 Ind., and authorities there cited.

The defendant has assigned for error, that the Court erred in permitting the plaintiff to ask the witness, Jacob Kunkle, over defendant's objections: "Did Aaron Cady, at the place of the accident, after it had happened, say to you that he never would pass that crossing again without sounding the whistle?"

The witness, Aaron Cady, had testified in chief, that before calling for down breaks, he gave two or three puffs of the whistle, when he first saw the team of the plaintiff, and was then asked, on cross-examination, whether he had not made that statement to Jacob Kunkle?

This was a question on a collateral matter, and the plaintiff was bound by Cady's answer. See 1 Starkey on Evidence, side page, 164.

A new trial should have been granted.

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The cause is *reversed*, and remanded to Special Term for a new trial.

NOTE.—The omission of a railroad company to give the signals required by the Statute, on the approach of a locomotive within eighty rods of a highway crossing, is a breach of duty to the passengers, whose safety it imperils, and to the wayfarer, whom it exposes to mutilation, and death. *Ernst v. Hudson River Railroad Company*, 35 N. Y.

When the passer-by knows of the immediate proximity of an advancing train, whether the warning be by signals, or otherwise, and having a safe and reasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence, and forfeits all claim to redress. *Same*.

Of the crossings the company's servants have a right to presume that there are no trespassers on the roadway. They are not bound to look out for trespassers, except for the safety of passengers. If a trespasser is seen, the company's servants will not render the corporation liable except for wanton negligence. The obligations of care and diligence rest on the trespasser. *Am. Law Reg.*, (N. S.), 7, 450.

Neither the company, nor the public, have exclusive rights of passage at a highway crossing. Their rights are concurrent. It is the duty of the traveler to look out for approaching trains and engines. If he fails to use the precaution, his omission to perform his duty is negligence, and he can not recover. *The Railroad v. Heilman*, 13 Wright, 60; 3 P. F. Smith, 255.

Unless the jury are satisfied by *affirmative evidence* that ordinary care was used, no recovery can be had for damages. *The Railroad v. Hogan*, 11 Wright, 246; 12 Md., 261; *Ibid*, 46.

With respect to the defendant's negligence, the *onus probandi* is of course on the plaintiff—4 Wright—except where he is a passenger suing his carriers. 6 Casey, 234.

The rule that the plaintiff can not recover damages, if his own wrong, as well as that of the defendant, conduced to the injury, is confined to cases where the plaintiff's wrong, or negligence, has immediately, or proximately contributed to the result. *Kline v. Central Pacific R. R.*, 37 Cal., 5 *Am. Law Reg.*, 397, N. S.; *Redfield on Railways*, 337; 2 *Car. & R.*, 730; 8 *C. B.*, 115; 12 *C. B.* (N. S.), 2; s. c., 3 *F. & F.*, 61.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law required towards those with whom there is a relation of trust, and confidence, or bailment between the parties. 8 Barb., 378.

See *Redfield's Am. Railway Cases*, 636. Also the following authorities touching the question involved in the above opinion:

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Davies v. Mann, 10 M. & W., 546; *Ilidge v. Goodwin*, 5 C. & P., 546, leading English Cases; 24 Vt. Rep., 487; 27 Conn. Rep., 393; 16 Ib., 421; 3 Ohio (N. S.), 172; 4 Ib., 474; 8 Ib., 570; 31 Penn. St. Rep., 510; 26 Conn. Rep., 591; 1 Cush., 451; 10 Barb., 621.

On the question of a party being bound by answer of witness, *See* 1 Greenl. Ev., 12 Ed., Sec. 442 to 449—for exceptions to general rule—Sec. 443, and authorities cited.

IN SPECIAL TERM.

**THE INDIANAPOLIS HOTEL COMPANY v. THE BOARD OF
COUNTY COMMISSIONERS of Marion County.**

Board of Commissioners—Contract with, when valid.

The Board of County Commissioners is a Court of special, and limited jurisdiction—it can only transact business as a Board when in session.

The County is not made liable on the certificate of the architect, employed by the Commissioners for a special duty, for materials furnished, if the order, or contract for the materials had not been confirmed by the Board, when legally in session.

Where the complaint shows a good cause of action, in this, that the material was furnished, and delivered at the special instance and request of the architect, and was used by direction of the Commissioners—

Held: That an action will lie for the value of the material furnished, irrespective of the alleged special contract.

Porter, Harrison & Hines, for plaintiff.

Barbour & Jacobs, for defendant.

NEWCOMB, J.—A demurrer to the complaint in this case presents the question of the liability of the County to pay

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for a quantity of earth and sand delivered on the public square in Indianapolis.

The complaint in a single paragraph alleges—

First, That on April 20th, 1870, Aaron McCray and Joseph K. English, then acting Commissioners of Marion County, entered into the following contract with plaintiff:

“ We, the undersigned Commissioners of Marion County, hereby authorize the Indianapolis Hotel Company to deposit the surplus earth taken from the excavation of their cellar, on the Court House Square, under the direction of Isaac Hodgson, the Court House architect, the same to be paid for at such price per yard as the said architect may fix upon.

(Signed)

AARON MCCRAY.

JOSEPH K. ENGLISH.”

Second, That on the 15th day of June, 1870, the Board of County Commissioners, being then in session, at the Court House, as a Commissioners' Court, entered into a contract with one Isaac Hodgson, by which he was appointed architect and superintendent of the new Court House about to be erected by the Commissioners, and he was empowered, among other things, “ to employ all the hands, and make all contracts for work and materials, *subject to the approval of the Board of Commissioners.*” And further, that said architect should “ make all the estimates, and certify all allowances for work, and materials.” That after said appointment of Hodgson as architect, &c., the latter contracted with plaintiff for the delivery of the surplus earth, and sand, from the excavation of the cellar of said Hotel Company, to be delivered at the Court House yard, to be used as material in the construction of the Court House, &c., and agreed with plaintiff that the same should be paid for by said County, by the yard, at the customary price of such material.

Third, That in pursuance of said contract so made by

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said McCray and English, "and ratified, confirmed and re-made," by said Hodgson as such architect, and agent of the County, and at his special instance and request, plaintiff delivered to the County 5,266 yards of earth, and the same quantity of sand, which was received and used by the Board of Commissioners in the construction of the Court House, and that said earth, and sand was worth, in the aggregate, at the time, and place of delivery, \$7,372.40. That afterward Hodgson made a measurement, and estimate of the material so delivered, and certified the same, fixing the value thereof at \$6,055.90.

Fourth, That plaintiff laid said account before the Commissioners, who refused to allow the same, but passed an order allowing plaintiff \$3,000, not admitting the liability of the County on any contract, or any liability beyond the sum of \$3,000, which was their estimate of the value of the material to the County, and stipulating that plaintiff might accept the sum so allowed, without being estopped from prosecuting her claim for the residue alleged to be due.

Is the County liable on the alleged contract entered into by McCray and English? Clearly not. The Supreme Court, in the case of *The Board of Commissioners of Fayette County v. Chitwood*, 8 Ind., 506, said: "The Board of County Commissioners is a Court of special, and limited jurisdiction. * * It is required to keep a record of its proceedings. It can only transact business as a Board when in session." And in that case it was held that an order of the Commissioners made at a special session, not held pursuant to law, was invalid, unless confirmed by the Board when legally in session, as by adopting it, or ordering payment upon it. The same general principle is enunciated in *Campbell v. Breckinridge*, 8 Blackf., 471. The contract of McCray and English was not made by them when sitting as a Board of Commissioners, and consequently created no liability on the part of the County. Indeed, plaintiff's coun-

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sel concede that, of itself this contract is not sufficient to sustain the action.

Nor do I regard the contract made by Hodgson as obligatory on the County. By the terms of his employment he was not empowered to make contracts absolutely, but only subject to the approval of the Board of Commissioners.

The complaint shows that the Board of Commissioners refused to approve this contract, and expressly disclaimed it. Nor is the plaintiff's claim strengthened by the allegation that the architect measured the material furnished by plaintiff, and fixed a price upon it, because, his authority to make estimates, and certify allowances, could be exercised only in those cases where supplies had been furnished pursuant to a contract approved by the Board of Commissioners.

But there is enough in the complaint to sustain an action for material furnished, independent of the contracts of the two Commissioners, and the architect, and to enable the plaintiff to recover the actual value of such material. It is charged that the earth, and sand was delivered at the special instance, and request of the architect, that the Commissioners have used the same in constructing the Court House, and that it is worth a certain sum. For this reason the demurrer is overruled.

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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; that the plaintiff and his associates fully performed the act on their part, and that the Peru & Indianapolis Road Company laid the iron on said switch, and maintained and used the same as a shipping station until January, when the road and its franchises were purchased by defendant at a sale made by the United States Marshal, decree of foreclosure rendered in the Circuit Court of United States, District of Indiana, in the year 1863; the defendant took possession of the road, and the in question, under said purchase, and continued to the switch for shipping purposes, and a way-station, with knowledge of the contract between plaintiff and the & Indianapolis Railroad Company, until June, 1870, defendant tore up and destroyed said switch. It is averred that by reason of the destruction of said , the plaintiff has been deprived of a shipping station, put to great inconvenience in shipping away his stock, horses, hogs, sheep, and grain, and is deprived of the of having products brought to, and delivered at said which was situated near and convenient to plaintiff's that his interests in that behalf are separate and distinct from those of all other persons, and that by reason of alleged wrongful act of the defendant, he has suffered injury to his damage, &c. A demurrer was sustained to complaint, and final judgment rendered for defendant which the plaintiff excepted, and appealed to the General

the complaint does not aver that the contract between plaintiff and the Peru & Indianapolis Railroad Company was in writing. The presumption is, therefore, that it was not—*Harper et al v. Miller et al*, 27 Ind., 277. It does not aver that the contract was made, and the switch built to the execution of the mortgage, nor that the mortgagee, at the time of its execution had notice that plaintiff claimed an interest in the switch. Neither does it

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IN GENERAL TERM.

ANDREW SMITH, Appellant, v. THE INDIANAPOLIS, PERU & CHICAGO RAILWAY COMPANY.

Appeal from BLAIR, Judge.

Railroad—License to, and permissive use of lands by, how revocable—Contract, pleading on.

Where the complaint does not aver that a contract is in writing, the presumption is that it was by parol.

Where parties living adjacent to a railroad track, made the grade, and furnished the cross-ties for a switch for neighborhood convenience, under a contract with the railroad company that the switch should remain permanently, &c.,

Held: That after the road, and franchises of the contracting company had been sold under a decree of foreclosure, the corporation purchasing the same might remove the switch, unless it assumed the original contract under Sec. 3 of the Railroad Act of March 3, 1865.

Hanna & Knefler, R. E. Smith, for appellant.

Hendricks, Hord & Hendricks, McDonald, Butler & McDonald, for appellee.

NEWCOMB, J.—The complaint in this case alleges that in the year 1859, the plaintiff, and divers other parties, contracted with the Peru & Indianapolis Railroad Company to grade, and furnish with cross-ties a switch, at the village of Vertland; that the railroad company agreed that it would furnish the iron, and lay the track on said switch, and forever thereafter keep the same in repair, and that it should remain a permanent switch and shipping station, for the use of the parties so grading, and furnishing the ties, and for the public gen-

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erally; that the plaintiff and his associates fully performed the contract on their part, and that the Peru & Indianapolis Railroad Company laid the iron on said switch, and maintained and used the same as a shipping station until January, 1864, when the road and its franchises were purchased by the defendant at a sale made by the United States Marshal, on a decree of foreclosure rendered in the Circuit Court of the United States, District of Indiana, in the year 1863; that the defendant took possession of the road, and the switch in question, under said purchase, and continued to use the switch for shipping purposes, and a way-station, with full knowledge of the contract between plaintiff and the Peru & Indianapolis Railroad Company, until June, 1870, when defendant tore up and destroyed said switch. It is further averred that by reason of the destruction of said switch, the plaintiff has been deprived of a shipping station, and is put to great inconvenience in shipping away his stock, cattle, horses, hogs, sheep, and grain, and is deprived of the means of having products brought to, and delivered at said switch which was situated near and convenient to plaintiff's farm; that his interests in that behalf are separate and distinct from those of all other persons, and that by reason of said alleged wrongful act of the defendant, he has suffered great injury to his damage, &c. A demurrer was sustained to this complaint, and final judgment rendered for defendant to which the plaintiff excepted, and appealed to the General Term.

The complaint does not aver that the contract between the plaintiff and the Peru & Indianapolis Railroad Company was in writing. The presumption is, therefore, that it was by parol—*Harper et al v. Miller et al*, 27 Ind., 277. It does not aver that the contract was made, and the switch built prior to the execution of the mortgage, nor that the mortgagee, at the time of its execution had notice that plaintiff claimed an interest in the switch. Neither does it

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aver that the switch was located

The plaintiff bases his claim on much as the defendant used the purchase of the road at the President of the Peru & Indianapolis, Peru & Chicago Railway Company, it must be presumed that and assumed the liability of the road Company under the contract his associates.

By Section 3, of an Act of the General Assembly, passed March 3, 1865, entitled "An Act to confirm the sale of railroads, to same to form corporations, and to and to define their rights, powers, such corporations to purchase, and branch roads, and to operate and among other things, provided that power, at any time after the formation aforesaid, to assume any debts and corporation, and to make such adjustment with any stockholder, or stockholder of such former corporation, as may be

We think it a clear proposition that did not give the plaintiff any own Vertland. The contract was a personal it was, indeed, competent for the defendant the Act of 1865, but which he had manner as to give the plaintiff a removal of the switch. In order to the performance of the contract of Peru & Indianapolis Railroad Company must have been a direct assumption

SUPREME COURT REPORTS.

Supreme Court Reports.

IN GENERAL TERM.

James M. Smith et al. vs. William C. Smith et al.

Appeal from the Circuit Court.

Case stated—Petition is presented to be made in general term—Many considerations for signature to—Petition read—Practice.

The petition of James M. Smith et al. is a petition to the Supreme Court, to set aside the judgment of the Circuit Court, in the case of James M. Smith et al. vs. William C. Smith et al., and to grant a new trial, on the ground that the judgment was rendered in violation of the provisions of the Act of the General Assembly, passed March 3, 1865, relating to the sale of railroads, and to the formation of corporations, and to the definition of their rights, powers, and duties.

The petition is supported by the affidavits of James M. Smith, and of William C. Smith, who are the parties to the petition, and who declare that the petition is true, and that they are entitled to the relief prayed for, by reason of the facts stated in the petition.

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defendant. Such assumption can not be inferred from the use of the switch, which, for anything the complaint shows, passed unincumbered to the defendant by the Marshal's sale of January, 1864, fourteen months before the enactment of the statute of March 3, 1865.

During these fourteen months the defendant can not be held to have assumed the alleged liability of the former corporation, by reason of her use of a switch belonging to herself by virtue of the Marshal's sale, nor could a liability attach under the Act of 1865, except at the option and election of defendant.

The judgment at Special Term is therefore affirmed with costs.

NOTE.—It does not matter whether the license be by parol, or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as, under some circumstances, it may be in equity, though not at law, it can not create or transfer an interest in land. *See English Cases, in 11 Meeson & Welsby's Reports, Ex*, 848; *4 Manly & Selwin's Rep., K. B.*, 565; *4 East.*, 107; *5 Barnwell & Cresswell's Reps.*, 22; *8 Ib.*, 288; *11 E. C. L.*, 207; *15 Ib.*, 219. *American Cases: 15 Wend.*, 384; *23 Conn.*, 214; *11 Mass.*, 533; *4 R. I.*, 47; *6 Md.*, 20.

A mere license affecting land is at law always revocable, even though granted for a valuable consideration. *4 East.*, 107; *3 M. & W.*, 833.

Usage connected with the granting of this sort of accommodation by the Railroad Company, will not justify the inference that a perpetual easement in this track was conceded. *11 Am. Law Reg.*, (N. S.), 374, 378.

Maguire *et al* v. Smock *et al*.

IN GENERAL TERM.

DOUGLAS MAGUIRE *et al* v. WILLIAM C. SMOCK *et al*.

Appeal from RAND, Judge.

*Common Council—Petition to, presumed to be made in good faith—Money consideration for signature to—
Petition void—Practice.*

The members of the Common Council of a city in acting upon a petition for the improvement of a street, have a right to assume that the petition is made in good faith by the owners of real estate, who are willing to pay their share of the burden, and who desire the improvement, and that all the petitioners are uninfluenced by any combination, by which a few, who are anxious for the improvement to be made, have agreed to pay a consideration, either directly or indirectly, to procure the signature of others to the petition.

Good faith toward the owners of real estate, who are in the minority, and who are opposed to the improvement, and to having the burden imposed upon themselves, requires that the petitioners should all act in good faith, and all be willing to assume their due portion of the tax, and that they should not be paid a consideration for signing the petition.

An agreement, by which a sum of money is guaranteed to be paid to certain persons, provided they will petition the Common Council of a city for the improvement of a street, is void, as against public policy, and can not be enforced.

Where a portion of pleading is struck out on motion, but no bill of exceptions is filed making the portion struck out a part of the record, no question is presented on appeal, upon the ruling of the Court in striking out.

Where specific facts are set out in an answer, from which a legal inference arises that the agreement sued on is corrupt and void, as against public policy, it is not error to sustain a demurrer to a reply, stating in general terms that the contract sued on was accepted, and the acts of the plaintiff, in compliance with the agreement, were done in good faith, without any desire, or design to exercise a corrupt, or fraudulent influence.

Maguire *et al* v. Smock *et al*

McDonald, Butler & McDonald, for appellants.

Test, Burns & Wright, for appellee.

BLAIR, J.—This action is upon the following instrument, made by the defendants to the plaintiffs:

“INDIANAPOLIS, April 8, 1870.

“We, the undersigned, guarantee unto Douglass Maguire and William J. Gillespie the sum of eight hundred dollars on the assessment for improving Delaware street with the Nicholson pavement in front of their property on said street, provided they petition the City Council of Indianapolis for said improvement.

WM. C. SMOCK,
D. H. WILES,
J. T. WRIGHT.”

The plaintiffs aver in their complaint that in pursuance of the contract, they did petition the City Council, and thereby became liable to pay large sums of money upon assessments made upon their property for said improvement, and that they have paid for the same a large sum in excess of the amount agreed to be paid by the defendants; and that the defendants were owners of real estate bordering on said street, and were anxious to have said improvement made, to enhance the value of their property, and that defendants made the contract in consideration of the benefits they would derive; and there is a balance yet due plaintiffs on the agreement, &c.

A demurrer was filed to the complaint, which was overruled, and exceptions taken by the defendants.

The defendants then answered in three paragraphs (the first two of which were afterwards withdrawn), the third being substantially as follows:

That on the 1st day of April, 1870, before the making of the agreement in complaint mentioned, a question was pending before the Common Council of the City of Indianapolis,

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as to whether they should contract for the taking up of an improvement that had been previously made at the expense of the property holders on Delaware street, north from Washington street to Massachusetts Avenue, and lay down on the same the Nicholson pavement, at great expense to the city, and the property owners on the line of the street; that the plaintiffs owned real estate on said street, and together with Andrew Wallace, William Smith, Samuel W. Bristor, Isaac Kahn, John Norris, William Wilkinson, John Coburn, and others, owning real estate on the same, had signed a remonstrance addressed to said Common Council, against the proposed improvement, and afterward the plaintiffs "corruptly and fraudulently entered into the agreement" set out in complaint, and did petition for the improvement of said street with the Nicholson pavement; and afterward the Common Council passed an ordinance providing for said improvement, and providing that the expense of the same be paid by the owners of real estate bordering on said street, except the public grounds owned by the city, and the crossings of streets and alleys; that afterward the contract having been let by the Common Council, and the work done, precepts were issued to the contractors, to collect from the owners of lots adjoining said street the amount to be paid by each, and that Andrew Wallace paid \$672.50, and William Smith paid \$980.50, and the others above, who had with the plaintiffs signed the remonstrance, were compelled to pay the several sums assessed against them, and that the city of Indianapolis, and other owners of real estate on the line of the street paid large sums; wherefore the defendants say that the contract sued upon was corrupt, and plaintiffs ought not to maintain their action thereon.

The plaintiffs filed a demurrer to this answer, which was overruled by the Court, and excepted to by the plaintiffs.

The plaintiffs then filed a reply, in substance as follows:

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After admitting the signing of a remonstrance, as set out in the answer, they say they signed it, not because they were opposed to the construction of the proposed improvement, but because they did not "feel pecuniarily able to bear the expense that would be assessed against their property by reason of said improvement," and that afterward the defendants, without solicitation from the plaintiffs, proposed to make the agreement set out in complaint, in consideration of the benefits that would arise to them by the proposed improvement enhancing the value of their property on said street. ["And said plaintiffs aver that they accepted said contract, and thereafter signed said petition to the Common Council for said improvement in perfect good faith, and without any desire, or design whatever to corruptly or fraudulently influence the said Common Council, or any officer, or person connected with the government of said city of Indianapolis, or any person whatever."]

That after they had received said contract, relying upon the same in good faith to aid them in paying their assessments to the amount named in the contract, they "were willing and anxious to have said improvements made, and were willing to pay therefor all over and above the amount agreed to be paid by defendants, and so desiring signed said petition in good faith for the purpose of procuring said improvement to be made, and they say that they have paid for said improvements a much larger amount than the sum so agreed to be paid by the defendants. Wherefore, &c.

A motion was made by the defendants to strike out all of the above reply except that part enclosed in brackets above. This motion was sustained by the Court, and the plaintiffs excepted.

The defendants then filed a demurrer to the reply, which demurrer the Court sustained, and the plaintiffs excepted.

The plaintiffs not replying further, judgment was rendered

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for the defendants, and the plaintiffs appealed to General Term.

The first error assigned is the overruling of the demurrer to the answer.

The Common Council of a city may act in providing for the improvement of streets, first on a petition signed by the resident owners of two-thirds of the whole front line of lots, or parts of lots, or secondly, of their own motion, without petition, whenever two-thirds of the members of the Council vote therefor. Act for the incorporation of cities, Sections 68 and 70.

The complaint shows that the agreement sued on was made by the defendants, on condition that the plaintiffs should "petition the City Council of Indianapolis for said improvement," and they allege that in pursuance thereof they did petition the Council. As it appears from the complaint, and answer, that a petition was presented, we are led to infer that the Council acted, in ordering, and contracting for the improvement, on a petition signed by the owners of the real estate, and not on their own motion by a vote of two-thirds of the members.

If the resident owners of two-thirds of the whole front line of lots bordering on a street petition for the improvement of the street, they may thus be the means of imposing upon the owners of the other third a tax to pay for an improvement to which they may be utterly opposed. It appears by the answer that the plaintiffs, as well as other owners on the line of the proposed improvement, were opposed to it, and the answer presents the question whether an agreement can be enforced, by which a portion of those who favor the improvement, promise to pay a portion of those opposed, a part of the cost of the improvement in front of their property to induce them to abandon their opposition, and petition the Common Council in favor of the improvement.

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The members of the Common Council of the City, in determining whether an ordinance shall be passed for the improvement of a street must exercise their judgment, and whether the ordinance is in its nature judicial, or legislative, the influences brought to bear upon them, to inform, or influence their judgment, and action, should proceed from the proper source, unmixed with corruption, or fraud. The members of the Council have a right to assume that the petition is made in good faith, by the owners of real estate, who are willing to pay their share of the burden, and who desire the improvement; and that all of the petitioners are uninfluenced by any combination, by which a few who are anxious for the improvement to be made have agreed to pay a consideration, either directly, or indirectly, to procure the signature of others to the petition. Good faith toward the owners of real estate, who are in the minority, and who are opposed to the improvement, and to having the burden imposed upon themselves, requires that the petitioners should all act in good faith, and all be willing to assume their due portion of the tax, and that they should not be paid a consideration for signing the petition. Establish the fact that such agreements are not in violation of law, as against public policy, and may be enforced in courts of justice, and the owners of real estate on our streets would be at the mercy of combinations, or of greedy contractors who might choose to donate a portion of their anticipated profits to the procuring of signatures to petitions in favor of street improvements. All reliance in petitions, as expressions of the honest wishes of the petitioners would at once be destroyed, and distrust and suspicion take the place of that confidence and good faith which should exist in all such proceedings. We believe these views are fully sustained by the following authorities, and that the action of the Court was right in overruling the demurrer to the answer: *Howard v. The First Indp't Church of Baltimore*, 18 Md. 451;

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Brown v. Brown, 34 Barb., 533; *Devlin v. Brady*, 33 ib, 518; *Fuller et al v. Dame*, 18 Pick, 471; *Cook v. Shipman*, 24 Ill., 614; *Gray v. Hook*, 14 N. Y., 449; *Marshall v. Balt. & O. R. R. Co.*, 16 Howard, 314.

There is no bill of exceptions, making the parts of the reply which were struck out on motion of the defendants, a part of the record, and hence the questions arising upon the ruling of the Court in this respect, are not properly presented for our consideration. *Saunders v. Heaton et al* 12, Ind., 20; *Oiler et al v. Bodkey*, 17 Ind., 600; *Hill et al v. Jameson*, 16 ib., 125.

Where specific facts are set out in an answer, as in this case, from which a legal inference arises that the agreement sued on is corrupt and void as against public policy, it is not error to sustain a demurrer to a reply stating in general terms that the contract was accepted, and the petition signed in good faith, without any desire or design to exercise a corrupt or fraudulent influence; and taken as a whole, we think the reply was bad, and the plaintiffs were not injured by the rulings.

The defendants assign for cross error the overruling of the demurrer to the complaint. This presents a question of more difficulty; but as the case was disposed of on the subsequent pleadings by the Court at Special Term, and we think by correct rulings, the question is not now important. But as the complaint does not show that the rights of any persons, other than the plaintiffs and the defendants, would be affected by the proposed petition, and improvement of the street, nor the character of the question that was pending for action before the Council, we are inclined to the opinion that the complaint was sufficient.

The judgment is affirmed.

NOTE.—All contracts for a contingent compensation for obtaining legislation, or to use personal, or any secret, or sinister influence on legislation, are

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void. 16 *How.*, 314; 6 *Dana*, 366; 1 *Aik.*, 264, (n.); 18 *Pick.*, 472; 10 *Barbour, Sup. Ct.*, 489.

For extent of powers, jurisdiction, and liability of municipal corporations, *See the case of Clark v. City of Des Moines*, in 6 *Am. Law Reg.*, (n. s.), 146—a valuable opinion with collection of authorities bearing upon the questions discussed—*Also* 5 *Am. Law Reg.*, (n. s.), 38, 445, 202.

IN SPECIAL TERM, 1871.

DELOSS ROOT v. FRANK ERDELMYER, Treasurer of Marion
County, *et al.*

Prayer for Injunction, to restrain the County Treasurer from enforcing payment of taxes on bank stock.

School Law—Trustees under, duty of—Taxes under, classification of—Municipal purposes, term defined, and applied—Township Trustees, tax levied by.

A special school tax levied pursuant to Section 12 of the School Law of March 6, 1865, does not exempt bank stock by virtue of Section 9, of the Bank Tax Act approved March 15, 1867, which provides that: "Nothing in this, or any other act shall be so construed as to authorize the taxation of stock in the Bank of the State of Indiana, or in any National Bank, for municipal purposes."

The term "municipal purposes," as used in that Act, has no application to township taxes, nor to special school taxes levied by trustees of townships, or by school trustees of incorporated cities, as special school taxes, under the authority conferred by Section 12, *supra* of the Act of 1865.

Such taxes are levied pursuant to the general law of the State, and for purposes connected with the general internal administration of the State,

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or to carry out the general common school system, and do not come within the definition of municipal taxes.

S. E. Perkins, for plaintiff.

Barbour & Jacobs, for defendants.



NEWCOMB, J.—The plaintiff alleges that he owns stock in the First National Bank of Indianapolis, to the amount of \$48,000, and on behalf of himself, and all others interested in the questions presented, he files his complaint, praying an injunction to restrain Erdelmyer, as County Treasurer, from enforcing payment of the following taxes charged against plaintiff's said bank stock on the tax duplicate of Marion County for the year 1870, namely :

First, The township tax levied by the Trustee of Center Township.

Second, A special school tax of twenty-five cents on each \$100, alleged to have been levied by the city of Indianapolis ; and

Third, A tax of twenty cents on each \$100 of taxables, levied by the Commissioners of Marion County, pursuant to a popular vote of the electors of the Township, as a donation to aid in the construction of the Indiana, and Illinois Central Railroad, on certain specified conditions.

The grounds on which the plaintiff bases his complaint are:

That the township, and special school taxes are levied for municipal purposes, and by law his bank stock is not taxable for those purposes.

Second, As to the railroad tax ; that the statute authorizing it is unconstitutional. That the railroad company is not constructing, and does not intend to construct said road through Center Township, nor through any of the counties of this State east of the line of counties bordering on the State of

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Illinois; and further, that the election at which the donation was voted, was not conducted according to law.

None of these objections against the railroad tax were insisted on in argument, except that going to the constitutionality of the tax.

The defendants demur to the complaint, and assign for causes of demurrer—

First, That the Court has no jurisdiction to enjoin the collection of taxes by the County Treasurer.

Second, That the complaint does not set forth sufficient facts to constitute a cause of action.

Third, That there is a misjoinder of parties defendant.

Counsel for defendants dispute the power of the Court to enjoin the collection of taxes in any case, and various decisions of the courts of other States are cited to support their view of the question; but it is sufficient to say that in Indiana the decisions are the other way. Our Supreme Court, in a long line of cases, beginning with that of *The State Bank of Indiana v. The City of Madison*, 3 Ind., 43, and ending with *Turner v. The Thorntown and Mechanicsburg Gravel Road Company*, decided November 30, 1870, has tacitly recognized, or expressly asserted 'this power as belonging to the Courts of this State exercising equity jurisdiction; and in the latter case the Court say, in so many words—"Equity will enjoin the collection of a void tax."

These authorities dispose of the question of jurisdiction.

The taxation of shares of stock in national and other banks in this State, is governed by an Act of the General Assembly, approved March 15, 1867, the first section of which is as follows: "The shares of capital stock owned, or held by any person, or body corporate, in any bank, or banking association chartered, or organized under the laws of the United States, and having its banking house, or place of business in this State, shall be included in the valuation of the personal property of the owner thereof for taxation, and

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shall be taxed at the place where such bank or banking association is, or may be located, at the same rate that is, or may be assessed on other taxable property in the hands of individuals in this State."

The second, and third sections prescribe the manner in which the County Auditor may obtain a statement of the stockholders of such banks, with the amount, and value of the shares by them owned respectively; and the third section provides that, after receiving such statement, "the Auditor shall proceed to enter the names of the stockholders of such bank, or banking association on the tax duplicate of the current year, and the amount, and value of stock held by such stockholder, respectively, and shall assess thereon to the owner, or holder thereof, the proper amount of taxes, according to the rate that may at the time be chargable on other moneyed capital, and personal property subject to taxation; and if any such stockholder shall be assessed on said duplicate for either real, or personal property other than such stock, the amount and value of his said stock shall be added to his assessment as personal property."

By Section 8, of an Act approved February 18, 1859, 1 G. & H., 638, it is provided that the Township Trustee "shall, at the March session of the County Board annually, with the advice and concurrence of the County Commissioners, levy a tax on the property of such township for Township, road, and other purposes, and report the same to the County Auditor, who shall enter the same on the proper tax duplicate, in a seperate column, or columns, and that the Treasurer shall collect it the same as other taxes are collected. But in case of the failure of such Commissioners and Trustee to concur, then the Board of County Commissioners shall determine upon, and levy such Township, road, and other taxes."

It was by virtue of this statute that the township tax complained of was levied.

The special school tax, as shown by exhibits filed with the complaint, was levied by three school trustees, chosen by the Common Council of the City of Indianapolis, in obedience to Section 5 of the School Law of March 6, 1865. That section is mandatory, leaving no discretion in the Council; nor has the Council any authority over, or control of the trustees so chosen, further than to require an annual report of their receipts, and disbursements.

The *fourth* section of that law makes "each civil township, and each incorporated city in the several counties of this State a distinct municipal corporation for school purposes, by the name, and style of the civil township, town, or city corporation," etc.

It is proper to remark here that the Common Council of a city has no agency, or authority in levying the special school tax, nor any control of its disbursement. The tax levied by the trustees is expended by them for the building, and repair of school houses, and in paying the expenses of the common schools, other than for tuition, which is provided for by a general State tax. No part of the general, or special school tax goes into the city treasury.

The *tenth* Section of the school law requires the trustees "to build, or otherwise provide suitable houses, furniture, and apparatus, and other articles, and educational appliances necessary for the thorough organization, and efficient management of said schools." This duty is imperative. The trustees may not in their discretion furnish, or not furnish school houses, furniture, etc., to the extent necessary for a "thorough organization, and efficient management of the schools." The only discretion they have is as to the style, and character of the houses, etc., and the amount of money that shall be expended on them beyond furnishing comfortable quarters for pupils, and the needful appliances for making the schools efficient.

To enable the trustees to perform the duties so imposed

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upon them, the *twelfth* Section of the same statute clothes them with power to levy a special tax, as follows :

"The trustees of the several townships, towns, and cities shall have power to levy a special tax, in their respective townships, towns, or cities, for the construction, erecting, or repairing of school houses, providing furniture, school apparatus and fuel therefor, and the payment of other necessary expenses of the school, except tuition, but no tax shall exceed twenty-five cents on each one hundred dollars of taxable property, and fifty cents on each poll, in any one year, and the income from such tax shall be denominated the special school revenue."

The *thirteenth* Section requires that "the County Auditor shall, upon the property and polls liable to taxation for State and County purposes, make the proper assessments of special school tax levied by the trustees, in the same manner as for State, and County revenue, and shall set down the amount of said tax on his tax list, and duplicate thereof, as other taxes are set down, in appropriate columns," etc.

On these statutes there can be no question that the plaintiff's bank stock is liable to pay the township, and special school taxes assessed upon it, unless there is some other statute exempting it. The *thirteenth* Section of the school law expressly declares that all property liable to State, and County taxation shall be assessed for this special school tax ; and the clear meaning of the statute imposing a township tax is that it shall be levied on all the property of the township assessed upon the tax duplicate of the County for taxation for State, and County purposes.

But it is claimed, and the proposition has been argued with much earnestness, and ability by plaintiff's counsel, that bank stock is exempted from these taxes by the *ninth* Section of the Act of 1867, above cited. That Section reads as follows: "Nothing in this, or any other act, shall be so construed as to authorize the taxation of stock in the Bank

of the State of Indiana, or in any National bank for municipal purposes."

The determination of this controversy must depend therefore upon the proper construction of the phrase, "municipal purposes," as used in the Section last quoted. The words, "municipal," "municipality," and "municipal law," have two well understood legal meanings—one general, the other limited, or particular. In relation to the Commonwealth of nations, a separate, independent State is a municipal organization, and its laws are denominated municipal laws, as contra-distinguished from the law of nations.

Relatively to the State, all its minor sub-divisions of counties, townships, school districts, etc., are sometimes termed municipal corporations, and sometimes *quasi* corporations, or bodies politic, and corporate. Lastly, we have towns, and cities, incorporated by special acts of legislation, or by general laws passed for that purpose, and clothed with many powers, and privileges not belonging to the people of the State at large. The following citations from standard legal works will illustrate the varied uses, and meaning of these terms. In Bouvier's Law Dictionary they are defined thus:

"MUNICIPAL: Strictly this word applies only to what belongs to a city. Among the Romans, cities were called *municipia*. These cities voluntarily joined the Roman Republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates*. With us the word has a more extensive meaning; for example, we call municipal law, not the law of a city only, but the law of the State. *Bl. Com.* Municipal is used in contradistinction to international; thus we say an offense against the law of nations is an international offense, but one committed against a particular, or separate community is a municipal offense."

"MUNICIPALITY: The body of officers, taken collectively,

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belonging to a city, who are appointed to manage the affairs, and defend its interests."

In Wharton's Law Dictionary is this definition:

"MUNICIPAL LAW: That which pertains solely to the citizens, and inhabitants of a State, and is thus distinguished from political law, commercial law, and the law of nations. It is now, however, more usually applied to the customary laws that obtain in any particular city, or province, and which have no authority in neighboring places."

In Walker's American Law, 219, it is said: "Public corporations are those which are founded with public means, and for public purposes. Their criterion is, that no individual has any interest in their foundation, except as a member of the general body politic. To this class belong all municipal corporations, beginning with the United States, and descending down through States, Counties, Townships, school districts, and the like. These are for the most part denominated *quasi* corporations, since, with the exception of cities and boroughs, they require no special act of incorporation. They possess scarcely any other corporate properties than those of holding property, and being parties to suits." See also *Angel & Ames on Corporations, Sections 15, 23.*

Burrill's Law Dictionary thus defines these terms:

"MUNICIPAL: Belonging to a city, town, or place having the right of a local government; belonging to, or affecting a particular, or separate community. Local; particular; independent."

"MUNICIPAL CORPORATION: (Lat., *villa corporato*.) A public corporation; a corporation created by government for political purposes, and having subordinate legislative powers to be exercised for local purposes, such as a county, city, town, or village. 2 Kent., 275."

"MUNICIPAL LAW: The rule of law by which a particular district, community, or nation is governed. The particular law of a State, or nation, as distinguished from

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public, or international law. A rule of civil conduct prescribed by the supreme power in a State."

"In a strict sense, the law of a particular place, such as a city, or town. Originally the law of a *municipium*, or free town."

"**MUNICIPIUM:** A free, or privileged town; one that had the right of being governed by its own laws, and customs. Hence the Latin *municipalis*, and English municipal."

Now, in what sense did the Legislature use the word "municipal" in the Act of 1867? Not in its most general sense, certainly; because, in that sense, the State itself being a municipal corporation, the exempting clause would nullify the rest of the Act, and no tax could be levied on bank stock for State purposes. Was it intended to exempt bank stock from taxation for county purposes? That is not alleged in the complaint, nor during the four years this law has been in force has such a proposition been advanced by any stockholder of any bank, so far as our court reports furnish evidence on that point. But if county taxes are not imposed for municipal purposes, how can it be said that township taxes come under that denomination? If the township is a municipal corporation, so is the county; and it seems to me that if township taxes are prohibited under the 9th Section of the Act of 1867, county taxes must come under the same prohibition.

It is manifest that to give the Act of 1867 any effect, or force whatever, we must use the word "municipal" in its primary, and strict sense—giving it that construction, State taxes are excluded from the exemption clause, and so, I think, are all other taxes except those levied by incorporated towns, and cities. This follows from the definitions of the term before cited, and from the inoperative character of the statute on any other construction.

But there are additional arguments drawn from other statutes, in favor of giving the words "municipal purposes"

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this limited interpretation. In the nomenclature of our tax laws it is believed there is not a single instance in which a tax levied for county, township, or school purposes is called a municipal tax, or a tax for a municipal purpose. On the contrary, each of these taxes has a statutory name. A tax levied for State purposes is called in the statute a state tax; for county purposes, a county tax; for township purposes, a township tax; for school purposes, the general, or special school tax, as the case may be; and such had been the case long prior to the enactment of the statute of 1867. This method of distinguishing by name the various taxes, was well known to the Legislature, and it must be presumed that if they had intended to shield bank stock from either of these ordinary taxes, they would have used apt, and unequivocal words to express such intent.

Second, Wherever in previous statutes this phrase, "municipal purposes," has been used, its application solely to incorporated towns, and cities is patent. Two instances of this sort have come under my observation—one in an Act of the General Assembly, the other in the Constitution of the State. The former is found in the Act chartering the Bank of the State of Indiana, approved March 3, 1855, the 15th Section of which reads as follows: "The capital stock of said bank shall be subjected to the same rate of taxation for State, and County purposes as the stock of other moneyed corporations; and the real estate, and other property of said bank, and branches, *situated in any city, or town*, shall be taxable *for municipal purposes*, in the same manner as other property so situated, but the capital stock of said bank, or branches shall not be taxable for municipal purposes." It needs no argument beyond the reading of this Section to show that "municipal purposes," as there used, means the purposes of the city, or town in which the bank is situated.

The other instance of the use of this phrase occurs in the fourth clause of the Schedule of the Constitution of 1851,

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namely: "*All Acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall in its discretion, modify, or repeal the same.*"

When we consider that prior to the Constitution of 1851, all the cities of the State were operating under special "Acts of incorporation," and that many towns sought, and obtained from the Legislature special charters, instead of organizing under the general law for the incorporation of towns, it is apparent that the term "municipal purposes," as used in the above quoted clause of the Constitution, had reference to Acts incorporating cities, and towns, and that it had no other application. It could have no reference to pre-existing laws organizing counties, and townships, for those civil sub-divisions of the State had already been recognized, and continued by Article VI of the Constitution, and by the first clause of the Schedule, which continued in force all laws not inconsistent with that Constitution.

As by Section 13, of Article XI, the General Assembly was thenceforth prohibited from passing special Acts of incorporation, and by the 23d Section of the Bill of Rights, it was provided that the General Assembly should not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms would not belong equally to all citizens, the fourth clause of the Schedule was, we may assume, adopted for the purpose of removing any doubts which might otherwise exist as to the continuance of city, and town organizations under charters then existing.

Third. I am further impressed with the correctness of the construction I have given to the term "municipal purposes," by the ruling of our Supreme Court touching special exemptions of property from taxation. "These exemptions," said the Court, in *Orr v. Baker*, 4 Ind., 88, "as they are contrary to common right, are not to be favored by the Courts. They should be confined to the specified objects, and to such as by

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reasonable intendment the Legislature must have had in contemplation. In short, the statute which exempts persons, or property from taxation is to be construed strictly." To the same effect is *The Common Council v. McLean*, 8 Ind., 328.

Following this rule, the word "municipal" in the Bank Tax Act, must be given its primary and strict meaning.

The complaint in this case is based on the theory that, because the township, and special school taxes are disbursed in the localities where they are collected, therefore they are necessarily municipal in their character, and the purposes for which they are levied, are municipal purposes. This seems to me an erroneous view of our township organization. Townships are civil divisions of the State, and an essential feature in its internal administration. No special powers, or privileges are granted to citizens of one township over another. The township can not legislate; every township tax is levied to enable the proper officer to execute some general law of the State, in the enactment of which the township, as such, has no voice. The State provides that certain duties, regarded as essential to its proper internal administration, shall be performed by officers chosen by the voters of a township, and empowers the township trustee, under the supervision of the County Commissioners, to tax the property of the inhabitants of the township to raise the necessary means. The State is the governing power in the township, and the taxes levied under the name of township taxes, are, in my judgment, levied for State purposes. In Chapter 1, Part 1, of the Revised Statutes of 1843, townships are treated, and recognized as civil divisions of the State, and as a part of its internal administrative machinery, and the same character is given them by Article VI of the Constitution of 1851.

The case is even stronger against the plaintiff's theory of the character of the special school tax. This can not properly be termed a tax for municipal purposes, unless the State

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tax proper is to be classed under that head. This tax, and the duties of the trustee in connection therewith, are integral, and necessary features of the common school system of the State, without which the system itself could have no existence. The Constitution requires the General Assembly "to provide by law for a general system of common schools wherein tuition shall be without charge, and equally open to all." In obedience to this mandate the General Assembly has established a system of common schools throughout the State. It has provided, by a general and uniform tax for the expenses of tuition, and has delegated to the trustees of civil townships, and incorporated cities the power, and made it their absolute duty, to levy and collect taxes within their jurisdiction to furnish the necessary school houses, furniture, apparatus, &c., necessary for the thorough organization, and efficient management of the schools." The trustee has no legislative power, indeed he has no discretionary power as to whether he will, or will not provide the houses necessary for the schools in his township. His duty is mandatory; his discretion can only be exercised, within reasonable limits, in the matter of style, cost, quality of the buildings, and other appliances he is required to provide. In performing his duties, the trustee is executing a general law of the State, and administering an essential part of the common school system of the State. For this, as well as for the other reasons given, I hold that the special school tax is not levied for municipal purposes, within the purview of the Bank Tax Law of 1867.

I have grave doubts of the constitutionality of the Act of the Legislature under which the railroad donation tax was levied. It is difficult to reconcile with our theory of government the imposition of a public tax upon the willing, and unwilling, to raise a fund to be turned over as a gift to a private corporation. But a matter of so much gravity as this ought not, I think, to be passed upon, at least adversely

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to the validity of the statute, by one only of the three Judges comprising this Court. I will, therefore, *pro forma*, sustain the demurrer to the complaint, and let this question go on appeal to the General Term, with the other legal questions in the case, if the plaintiff shall desire to take the opinion of the full bench on any, or all of them.

NOTE.—On appeal to the General Term, Judge Rand declined to sit, for the reason that he was interested as a holder of National Bank stock. The judgment at Special Term was affirmed *pro forma*, by the other two Judges, without a written opinion. Thereupon the plaintiff appealed to the Supreme Court, where the judgment of the Superior Court was in all things affirmed.
—REP.

IN GENERAL TERM, 1871.

JOHN HEDRICK, Appellant, v. HENRY KRAMER.

Appeal from RAND, Judge.

Costs—Rule as to, in Superior Court.

The rule as to costs under Section 337, of the Code, applies as well to actions begun, and determined in the Superior Court.

Spahr & Daily, for defendant.

Woollen & Ruddell, for appellee.

BLAIR, J.—This was a suit commenced in this Court to recover on a breach of warrants in the sale, or exchange of personal property.

There was a trial at Special Term, and the plaintiff recovered a verdict, and judgment for thirty dollars.

The defendant then moved to tax the costs to the plaintiff, which motion the Court sustained. To this the plaintiff excepted; and this is the only error presented in the case.

It is urged that the 397th Section of the Code (2 G. & H., p. 227,) which provides that in actions commenced in "the Circuit Court, or Common Pleas, if the plaintiff recover less than fifty dollars exclusive of costs, he shall pay costs, &c.," does not apply to this Court, for the reason, that at the time of the passage of that Act this Court was not organized, and the Act establishing it contains no express provisions extending the provisions of the Section cited to the Superior Court.

It is true the Act organizing this Court does not in express terms extend the above provision to this Court. It was evidently the intention of the Section cited, that actions where the recovery would be less than fifty dollars should be brought in Justices' courts, and the Act organizing this Court was evidently not intended to change that rule. This Court was organized to transact that class of litigation which was crowding the dockets of the Circuit, and Common Pleas Courts, and not to relieve the dockets of Justices of the Peace. The whole context of the Act establishing this Court shows that it was the intention of the Legislature that the same rule as to costs should apply in this Court that prevail in the Circuit and Common Pleas Courts. This is in accordance with the rule of construction announced by Chief Justice Marshall.

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid the intent." *Derousseau et al v. The United States*, 6 Cranch, 307.

The judgment in Special Term is affirmed.

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IN GENERAL TERM, 1872.

MADISON EVANS v. DAVID H. WADKINS, Appellant.

Appeal from BLAIR, Judge.

APPRAISEMENT—*when ineffective—Sale under, when void—*
APPRAISERS—*how chosen—*
STATUTES construed.

An appraisement should not be of the rental value in gross for the term of seven years, but of each year separately, otherwise it is not such an appraisement as will authorize the offer by the Sheriff, of the rents and profits.

An appraisement made without the knowledge of the execution defendant, and without notice to his agent, or attorney to select an appraiser, but instead such appraiser is selected by the Sheriff, renders the appraisement ineffective, and the sale following it void.

The right of an execution defendant to select one appraiser is not confined to levies on personal property merely.

Sec. 447, of the Code, as well as *Sec. 450*, show the legislative purpose to be that both real, and personal property are to be appraised in like manner, and appraisers chosen in the same way.

A statute is not always to be construed literally, nor should one of several sections be construed alone when such construction would work an injustice, or become an absurdity.

The intent of a statute, as collected from the whole, and all its parts will prevail over the literal import of particular terms, and control its strict letter, where the latter would lead to possible injustice, or contradiction.

Test, Burns & Wright, for appellant.

Perrin & Baker, for appellee.

NEWCOMB, J.—The suit at Special Term was brought by Mason, the appellee, to set aside a sale by the Sheriff, of certain real estate in the city of Indianapolis, belonging to

Evans v. Wadkins.

plaintiff, which was sold on an execution in favor of Wadkins, the appellant, and purchased by the latter. A demurrer to the complaint was overruled, and the defendant excepted. A general denial was then filed, the cause submitted to the Court, which found the facts specially, with the conclusions of law arising thereon.

The special finding sets forth the facts substantially as stated in the complaint, as follows: Execution was issued to the Sheriff, on a judgment in the Marion Common Pleas, in favor of Wadkins, and against Mason. The Sheriff failing to find any personal property belonging to the defendant, levied the execution on his real estate described in the complaint, had the rental value for seven years, and the fee simple of each tract, appraised, and sold the fee simple, after the proper advertisement, to the execution plaintiff, at two-thirds of the appraised value thereof; that the appraisement was made wholly without the knowledge of the execution defendant, although he was a resident of the city of Indianapolis, where said property was situate, and lived on, and occupied one of the lots so sold; that no notice was given him, his agent, or attorney, to select an appraiser; that he had no actual knowledge of the levy upon, or sale of said real estate, until after the Sheriff's deed had been executed to the purchaser, though the Sheriff had notified him that he held the execution, and that he had been directed to levy the same upon the real estate in question.

The Court further found that the appraisers appraised the rents and profits of each of the two lots for seven years at \$10.00, and the fee simple of one lot at \$75.00, and of the other at \$50; that the actual value, as shown by the evidence, of the rents and profits for one of the lots for seven years was \$420.00, and the fee simple \$333.33, and that the value of the rents and profits for seven years of the other lot was \$700.00, and the fee simple \$666.66, and that the prior incumbrances on the whole did not exceed \$40.00.

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As a conclusion of law from the foregoing facts, the Court found that the appraisement, sale, and conveyance of said real estate were illegal and void, and should in all things be set aside, and held for naught, and rendered judgment accordingly, having overruled a motion in arrest.

An exception was duly taken to the conclusions of law found by the Court.

The only question in the case, as made by the pleadings, is, whether the failure of the Sheriff to notify Mason to select an appraiser, and selecting said appraiser himself, renders the sale void. The statutes governing the appraisement of property on execution, so far as it is important to notice them in this case, are as follows: See 2 G. & H., pp. 242 and 243.

"SEC. CCCCLV. No property shall be sold on any execution, or order of sale issued out of any Court, for less than two-thirds the appraised value thereof, exclusive of liens and incumbrances, except where otherwise provided by law."

SEC. CCCCLVI. The Sheriff, immediately upon levying an execution, shall proceed to ascertain the cash value of such personal property."

"SEC. CCCCLVII. For that purpose two disinterested householders of the neighborhood where the levy is made shall be selected as appraisers, one of whom shall be selected by each of the parties, or their agent, or in the absence of either party, or his agent, or upon the refusal of either party, after three days notice by the Sheriff to make the selection, the Sheriff shall proceed to select the appraisers. They shall forthwith proceed to appraise the property according to its cash value at the time, deducting liens and incumbrances; and in case of their disagreement as to the value, they shall select a like disinterested appraiser, and with his assistance shall complete the valuation, and the appraisement of any two of them shall be deemed the cash value."

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"SEC. CCCCL. The Sheriff shall furnish the appraisers a schedule of the property levied on, with the incumbrances made known to him, and they shall proceed to fix and set down opposite to *each tract, lot, or parcel of real estate*, and of the several articles of personal property, the cash value, deducting liens, and incumbrances, which schedule they shall return to the Sheriff."

The appellee takes the position that Section 447, above quoted, is applicable only to the appraisement of personal property, and therefore it was not necessary for the Sheriff to notify the execution defendant to select an appraiser, and this argument is based on the use of the phrase, "such personal property," in the preceding section.

That such a construction is not in harmony with the intention of the Legislature is manifest from the other sections we have cited, and would either deprive an execution defendant of the benefit of the appraisement laws so far as real estate is concerned, or prevent sales of real property on execution, in every case where the law does not provide for a sale without appraisement. Sections 447 and 450 plainly show the legislative purpose to be that both real and personal property are to be appraised in like manner, and that the appraisers are to be chosen in the same way in each case. Otherwise the provision of Section 450, requiring the appraisers "to fix and set down opposite to each tract, lot, or parcel of real estate" the cash value, &c., would be meaningless, and inoperative. One of several sections of a statute will not be construed alone when such construction would lead to injustice or absurdity; but the intent of a statute as collected from the whole and all its parts, will prevail over the literal import of particular terms, and control its strict letter, where the latter would lead to possible injustice and contradiction. *City of Jeffersonville v. Weems et al.*, 5 Ind., 547; *Allison v. Hubbell*, 17 Ind., 559; *The State ex rel Benton v. The Mayor, &c., of Laporte*, 28 Ib., 248; *Miller v. The*

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Board of Commissioners, &c., 29 Ib., 75. Every part of a statute should receive effect if possible—*Hutchen v. Niblo*, 4 Blackf., 148; *Green v. Cheek*, 5 Ind., 105; *Stayton v. Hulings*, 7 Ind., 144.

And, in construing a statute it is proper to look to its effects. Statutes are not always to be construed literally. *Donnell v. The State*, 2 Ind., 658.

In the light of these rules of construction, and from the provisions of the succeeding sections of the statute governing the appraisement, and sale of property on execution, we cannot hold that the right of a defendant to select one appraiser is confined to levies on personal property alone, but the construction must be as if the word "personal" were omitted from Sec. 446, or the words, "or rent" were inserted between that and the word "property." In this way, effect is given to every part of the statute, and the benefit intended to be secured to a defendant is accomplished.

The appraisement having been illegally made was ineffective, and the sale following it was void. *Davis v. Campbell*, 12 Ind., 192; *Doe ex dem Holman v. Collins*, 1 Ib., 24; *Tyler v. Wilkinson*, 27th, Ib., 450; *Cummings v. Foote*, 13 Ib., 144; *Fletcher v. Holmes*, 25 Ib., 458.

Although it is not specially set forth in the complaint as a ground for setting aside the Sheriff's sale, and deed, the record presents another fatal defect in the appraisement.

Sec. CCCCLXIV of the Code of Practice, (2 G. & H., 249,) provides that "rents and profits may be sold as other property, the appraisers setting down the value of each year separately."

The appraisement in this case was of the rental value in gross for the term of seven years, and not the value of each year separately. Consequently it was not such appraisement as authorized an offer of the rents and profits by the Sheriff, and precluded a legal sale of the fee simple. *The Indiana Central R. W. Co. v. Brady & Prall*, 15 Ind., 23.

The judgment at Special Term is affirmed with costs.

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IN GENERAL TERM, 1872.

**MONROE M. MILFORD v. GEORGE A. WESLEY *et al.*, Appel-
lants.**

Appeal from NEWCOMB, Judge.

**INNKEEPER, liability of, for property stolen—VERDICT, when
Court will not disturb—PLEADING, rule in.**

The "rules" of a hotel requiring "money, jewelry, and other valuables" to be deposited in the safe of the office, do not apply to a watch which a guest has on his person, and keeps for his personal use, and which is essential to his personal comfort, and convenience.

Where a guest is told by the inn-keeper, or his servant, "not to lock the door, for other parties had to come into the room, to go to bed, and the door should be left unlocked for them," or "that he could either lock the door, and get up, and let them in when they come,"

Held: That a lack of ordinary care can not be imputed to a guest, acting in obedience to such instruction—in leaving the door unlocked—and the inn-keeper will be responsible for property stolen from such guest.

The Court will not disturb the verdict of the jury, on a question of excessive damages, if such verdict is within the limits of the evidence.

Specific matter not alleged in answer can not be introduced as evidence under the general denial.

Ray, Voss, Davis & Holman, for appellants.

James Buchanan, for appellee.

BLAIR, J.—This is a suit by the plaintiff against the defendants, who are inn-keepers, to recover the value of a gold watch, and chain, and certain articles, as a seal, &c., attached to the chain. The plaintiff alleges in his complaint that he was a guest at the hotel kept by the defendants, and by their

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direction he occupied a bed in room No. 84 in said hotel; that there were other beds in the same room, occupied by other guests, who were strangers to the plaintiff, and by request of the defendants, or their servant, on retiring he left the door of his room unlocked, that the other guests might enter the room; that he was informed by the servant of defendant that the other guests to occupy the room were honest, and on retiring he placed his watch, chain, &c., between the mattresses of the bed he occupied, from whence they were stolen while the plaintiff was asleep.

The defendants filed a general denial to the complaint.

The cause was submitted to a jury, and a verdict returned for the plaintiff. The defendants filed a motion for a new trial, which was overruled by the Court, and a judgment rendered on the verdict for the plaintiff.

The defendants appealed to General Term.

At the trial of the cause it was shown that the plaintiff had before retiring deposited his money with the clerk, to be put in the safe in the office, and during the day he had also deposited a small box containing some jewelry, all of which was delivered to the plaintiff next morning; and the defendants offered to introduce in evidence the heading on the page of the hotel register where the plaintiff's name was registered, which heading read as follows: "The proprietors will not be responsible for money, or valuable packages, unless deposited in the safe of the office," and also a certain regulation, or rule, printed upon a card, which was fastened upon the inside of the door of room No. 84, occupied by the plaintiff on the night when he was a guest at the hotel, as follows: "The proprietors will not be responsible for money, jewelry, or other valuables, unless deposited in the safe of the office."

An objection was made by the plaintiff to the introduction of this evidence under the issues joined, and it was excluded by the Court.

It is claimed by the defendants that these regulations, or

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rules, were a part of the conditions upon which the defendants received guests into their hotel, and that they were assented to by the plaintiff on becoming a guest of the defendants', and that a failure to comply therewith on the part of the plaintiff, precludes him from recovering for articles lost by reason of such failure.

If, as is assumed by the defendants, it was intended to be shown by the evidence offered, that the liability which the law imposes upon the inn-keeper for the loss of the property of his guest, was lessened, or limited by an implied contract, or by notice brought home to the guest, directing his property to be placed in the safe, the matter thus relied upon as a defense, to be available should have been set up in answer, and not being so pleaded, the ruling of the Court in excluding the evidence was right.

And even further than this, we do not think that the "heading of the register," nor the rules posted upon the door of the room can be held to apply to a watch which a guest has about him for his personal use, and which is essential to his personal convenience. Laid away "in the safe of the office" it would be of no use to him. Its value as property might for the time being be secure, but its value as an article capable of contributing to the personal comfort of the guest would be taken from him.

A guest on retiring to his room may well insist upon keeping his watch about him, as a personal right, that he may regulate his rising, or to inform him of the time for a departing train.

The evidence shows that the watch which was lost, was one which the plaintiff carried for his personal use, and there is a well grounded distinction between such an article, and "valuable packages," and the like, which are not immediately requisite to the personal comfort and convenience of a guest. The latter class of articles may with reasonable propriety be required to be deposited in the safe in the office, but not the

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former. *Pope v. Hall*, 14 La. An., 324; *Profiel v. Hall*, Ib., 524.

The defendants excepted to the instructions given to the jury by the Court. No special objections have, however, been pointed out, and we think the law as applied to the evidence was correctly stated in the instructions.

The defendants asked certain instructions, which were refused by the Court, the first two of which were as follows:

“*First*, That if the jury find from the evidence that the loss of the watch, chain, and attachments thereto was in any sense attributable directly to the want of care, and prudence on the part of the plaintiff, he can not maintain this action, and you should find for the defendant.

“*Second*, If the jury find from the evidence that the plaintiff failed to take such care of the watch, chain, and attachments thereto as a person of ordinary prudence should take under all the circumstances which surrounded the transaction, the defendants are not responsible, &c.”

The first instruction asked states a correct proposition of law, for it is undoubtedly true that if the loss is “attributable directly to the want of care, and prudence on the part of the plaintiff, he can not recover,” but, as we think, there was no evidence indicating, or tending to show a want of care on the part of the plaintiff, the instruction was properly refused. It is true that the door of his room was left unlocked, but the plaintiff says the servant of defendants who showed him to the room told him “not to lock the door, for other parties had to come into the room to go to bed, and the door should be unlocked for them;” and the clerk of the defendants who assigned the room to the plaintiff, says that he “told him some of the parties who were occupying the room were not yet in, and that he could either lock the door, and get up to let them in when they came, or if he did not wish to be disturbed he could leave it unlocked,” hence under the circumstances the evidence does not indicate any

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carelessness on the part of the plaintiff on account of the door being unlocked.

The second instruction asked is liable to the same objection, and in addition it seems to assume that a lack of ordinary care on the part of the plaintiff would relieve the defendants from any responsibility, however negligent they, or their servants might be. This principle is not applicable in a case by a guest against an inn-keeper for property stolen from the guest.

The *third* and *fifth* instructions asked by the defendants, among other things, present the question of the release of the defendants from liability on account of the heading of the register, and the rules posted upon the door of the room, which has already been discussed, and as the evidence on that point was properly excluded, the Court was right in refusing the instructions.

The only remaining question raised is that the damages assessed are excessive. There was some conflict in the evidence as to the value, but it was a question for the jury to determine from the evidence, and the amount found by the jury is within the limits made by the witnesses, and hence the Court can not find that the damages are excessive.

The judgment rendered in Special Term is affirmed with costs.

NOTE.—Inn-keepers are chargeable for the goods of their guests lost, or stolen at their inns; and to render them liable, it is not necessary that the goods should have been delivered into their special keeping, nor to prove negligence. *Chute v. Wiggins*, 14 Johns., 175; 2 Kent, 761, 7th Ed.

It is not necessary that the goods should have been placed in the special keeping of the inn keeper. If one is a guest, and the goods are within the inn, the landlord is liable for them. *McDonald v. Edgerton*, 5 Barb., 560; 2 Kent, Vol. 2, *star page*, 594.

Inn-keepers, as well as common carriers, are regarded as insurers of the goods of their guests while in their keeping, and are bound to make restitution for any injury, or loss not occasioned by the Act of God, the common enemy, or by the negligence, or fault of the guest. 5 T. R., 273; 3 Dyer, 266; 1 Yates, 34; 21 Wend., 122, 282; 5 Blackf., 523. See also 10 Ind., 212.

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It is not necessary that the goods should have been in the special keeping of the inn-keeper in order to make him liable; if they be in the inn, that is sufficient to charge him—*Bennet v. Mellor*, 5 *Term Rep.*, 273. The *prima facie* presumption is, that the loss was occasioned by the loss, or negligence of the inn-keeper, or his servants, but the presumption may be rebutted. *Dawson v. Chauncey*, 5 *Adol & Ellis*, (N. S.) 164. See also 9 *Pick.*, 280; *Merritt v. Claghorn*, 23 *Vt.*, 177; *Overseens v. Warner*, 3 *Hill*, 150.

Notice by printed cards is insufficient, unless it be proved that the plaintiff had seen such cards. *Rowley v. Horne*, 3 *Bing.*, 2; *Griffiths v. Lee*, 1 *Car & P.*, 110. The burden of proof is on the inn-keeper, to show that the person who is his guest is fully informed of the terms, and effect of the notice. And unless it "can be brought home to such person directly or constructively, it is a mere nullity. *Story on Bailments*, Sec. 560; *Angell on Carriers*, Secs. 133, 247.

2 *Greenl. Ev.*, Secs. 216, 218—where if notice is proved, "its effect may be avoided on the part of the plaintiff, by showing the loss to be occasioned by the *malfeasance, misfeasance, or negligence*" of the carrier, or keeper.

See further: 2 *Campb.*, 415; 2 *Stark, R.*, 53; 5 *Bing.*, 212. Also *Hollister v. Nowlen*, 19 *Wend.*, 234; *Brooke v. Pickwick*, 4 *Bing.*, 218; 31 *Maine*, 228; 16 *Penn. State*, 67; 100 *Mass.*, 425; 1 *Hilton*, 84; 24 *Ind.*, 347. Goods belonging to a guest stolen at an inn, may be said to be the property either of the inn-keeper, or guest; *Rex v. Todd*, 1 *Leach*, cc, 557.

 IN GENERAL TERM.

FREDERICK C. STURM, appellant, v. WILLIAM J. POTTER,
Constable of Decatur County.

Appeal from RAND, Judge.

WARRANT—for arrest of fugitives—HABEAS CORPUS.

A Warrant for the arrest of a fugitive may be served in any county in the State, by the Constable to whom the warrant was issued, in the county where the offense was committed: *Provided*, the certificate of the County Clerk is attached, showing that the Justice of the Peace issuing the warrant, is duly commissioned, and qualified as such, and that his signature thereto is genuine. Sec. 8, *G. and H.* 621, and 2, *G. and H.* 319, construed together.

Sturm v. Potter.

Frederick C. Sturm filed his petition in this Court, alleging that William J. Potter is unlawfully restraining him of his *liberty*, and praying for a writ of Habeas Corpus. The writ was issued and returned, and Potter in his return says, that he holds said Sturm by virtue of a writ issued by a Justice of the Peace, of Decatur County, to him, as Special Constable of said county, directing him to arrest said Sturm and bring him forthwith before said Justice, to answer to a charge of obtaining goods under false pretences, in Decatur County. The writ, affidavit upon which it was issued, and the Clerk of Decatur County's certificate of the *genuineness* of the writ issued by the Justice, is made part of the return. Exceptions were filed to the return, which were overruled and excepted to, and a denial of the return to the writ of Habeas Corpus was filed—the cause heard at Special Term, and Sturm was remanded to the custody of Potter. From this judgment Sturm has appealed to General Term.

The only question raised is, as to the sufficiency of the return to the writ of Habeas Corpus. It is contended that a Constable of Decatur County cannot *execute a writ* in Marion county, issued to him by a Justice of the Peace for Decatur County, commanding him to arrest a person charged with a crime committed in Decatur County.

Section 8, of an act prescribing the number, and defining the powers and duties of Constables, approved May 27, 1852, 2 *G. and H.*, 621, reads as follows:

“In executing a warrant for the apprehension of any fugitive from justice, who has fled into another county, from any county in this State, a Constable may arrest such offender in any county where he may be found; but if such offender shall require it, he shall not remove him from such county, without taking him before some officer authorized to issue and try writs of Habeas Corpus, and giving such offender time to make application for such writ.”

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This would seem to confer ample authority on a Constable of one county, when he has a proper writ charging a criminal offense, committed in such County, to follow the alleged culprit into any other county in the State and arrest him, and take him before the justice who issued the writ, first giving him an opportunity to apply for a writ of Habeas Corpus, if he desires so to do.

The second section of the justice's act, as amended December 2, 1865, 3 *G & H*, 319, reads as follows:

"Any justice shall, on complaint made on oath before him, charging any person with the commission of any crime or misdemeanor, issue his warrant for the arrest of such person, and cause him to be brought forthwith before him for trial, or examination, and such warrant may be served throughout the county, and when the defendant has escaped from the county in which the offense was committed, upon attaching a certificate of the Clerk of the county, setting forth that the justice issuing the warrant is duly commissioned and qualified as such, and that his signature is genuine, the same may be served by any constable or sheriff in any county in which the defendant may be found."

It is urged that this section only authorizes a constable, or sheriff of the county to which the fugitive has fled, to make the arrest.

We cannot concur in this view. We think a proper construction of this section authorizes a constable, or sheriff, of the county in which the offense was committed, to arrest the fugitive, in any county where he may be found, by virtue of a warrant issued by a justice of the peace in the county where the offense is committed.

The warrant in this case is issued to Potter as special constable of Decatur County. It certainly could not have been contemplated by the Legislature, that this warrant should be transferred to a constable of Marion county, or that it should be returned to the justice, and a new one be

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issued to Marion county—and if in the mean time the fugitive had slipped into an adjoining county, a new warrant should be obtained, directed to a constable of that county. This construction would give an adroit fugitive all the chances of escape he would desire.

We think that when he found that Sturm had fled from Decatur county, he had a right to get the Clerk's certificate attached to the warrant, and then pursue, and arrest the fugitive in any county in the State.

Under this view the two sections work harmoniously together.

We have been referred to "An Act concerning fugitives from justice," approved May 27, 1852, 2 *G. & H.*, 434, but we think it in no way conflicts with the duties we have referred to. It provides for proceedings in the county where a fugitive may be found, for his arrest and return to the county where the crime was committed. This is another means by which fugitives may be arrested and returned.

In the cause at bar the parties have adopted another course, and one we think equally legal.

The judgment remanding the criminal at Special Term, is affirmed.

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IN GENERAL TERM, 1872.

HORACE F. KENYON ET AL *v.* THE CITY OF INDIANAPOLIS,
Appellant.

Appeal from RAND, Judge.

MUNICIPAL CORPORATION—*when liable for injuries caused by
defects in highway—*
HIGHWAY—*defects in.*

All persons in using the streets and sidewalks have the right to assume that they are in a good, and safe condition, and to regulate their conduct upon that assumption.

If a city permits the construction of a vault under a sidewalk, she must use due care, and diligence to see that the vault is properly constructed, and the opening thereto securely and safely covered, and if constructed in a sidewalk, over which the city has exclusive control, the Court will infer, in the absence of any allegations to the contrary, that it was constructed under a license from the city authorities.

Proof of the mere existence of a latent defect in a sidewalk, in a city, is not enough to charge the corporation with negligence; the corporation must in some way be in fault in connection with the defect, and if the defect does not originate in the construction, express notice of the defect, or negligence of duty in not ascertaining and remedying it, must be shown, else the city will not be liable to repair. Hence it is not enough, to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on her part, she was injured.

A liability only attaches to a municipal corporation where there has been a failure to remedy such defects as may be detected, and removed by the

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exercise of ordinary care, and diligence. Mere knowledge on the part of a few private citizens of a latent defect in a sidewalk, is not sufficient to charge the city with notice.

Although some of the special findings may be inconsistent with each other, the verdict will not be disturbed, if taken as a whole, they are not inconsistent with the general verdict.

J. S. Harvey, for appellant.

Barbour & Jacobs, for appellee.

BLAIR, J.—The complaint in this case, after alleging that it is the duty of the city of Indianapolis to keep the streets and sidewalks in good, safe repair, charges that a certain opening in the sidewalk on West New York street, in said city, in front of the property owned by the defendant, Mary Edgar, was constructed without using due care to make the same safe, and was insecurely covered, and the cover "having been insecurely fastened, and the support beneath the same having worn away, and fallen out." As the plaintiff, Emma M. Kenyon, the wife of Horace F. Kenyon, was passing along the sidewalk, and having no knowledge of the unsafe condition of the cover, she stepped on the same when it gave way, and turned beneath her, causing her to fall through the opening into the vault beneath, whereby she was injured, etc.

A demurrer to the complaint on the part of the city was overruled. We think the complaint was sufficient.

An answer was filed by Mary Edgar, and the plaintiffs then dismissed the cause as to her.

The city then filed her answer, in three paragraphs, as follows:

First. A general denial.

Second. That the opening mentioned in the complaint was constructed by Mary Edgar, or by the persons under whom she holds title to the premises described in the complaint, for their sole use and benefit; that it was not constructed by the city in the improvement of the sidewalk,

or otherwise, for the use of the city, and that the defendant, her officers, or agents, never at any time had notice that the vault, and covering were defectively constructed, or were out of repair.

Third. That neither the defendant, nor any of her officers, or agents, had any notice, or knowledge of the defective construction of the vault, and covering, by Mrs. Edgar, constructed for her own use, etc.

Demurrers were sustained to the second and third paragraphs of answer.

The second paragraph of answer proceeds upon the assumption, and we think correctly, that the complaint, although containing but one paragraph, seeks a recovery on two grounds; *first*, that the injury complained of resulted from a defect in the original construction of the vault, and covering; *second*, from the same being suffered to be, and remain out of repair.

The answer attempts to meet the first charge by saying that the vault was made by Mary Edgar, or those under whom she holds title to the property, for their sole use, and benefit, and not for the use of the city, or by the city, in the improvement of the sidewalk, and that the city had no notice that there was any defect in the construction.

If the vault, and covering was constructed in the sidewalk, over which the defendant had exclusive control, we may, in the absence of any allegation that objections were made, infer that it was done under an implied license from the city authorities. *Robbins v. Chicago City*, 4 Wal. 657.

The question raised by the demurrer may therefore be stated as follows: If the city permits the owner of property abutting a public street to construct a vault under the sidewalk, with an opening in the walk, for the sole use of the owner of the property, is the city bound to see that it is constructed with due care for the safety of the public having a right to pass, and repass over the walk?

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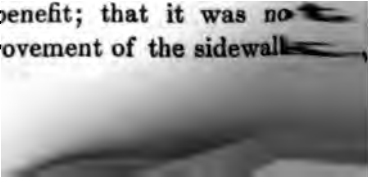
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This is a question of great importance, both to the city, and the public.

It is urged on behalf of the defendant, that the case of *Stackhouse v. The City of Lafayette*, 26 Ind., 17, settles the rule that the city is not bound in such cases to look after the the construction of the vault, and exercise reasonable care in seeing that it is made safe for persons passing over the sidewalks, and that the person making the vault is alone liable for an injury resulting from a defect in the construction of the same.

In that case the city of Lafayette had granted the right of way along a certain street to a railway company. The company, in constructing her road, found it necessary, in crossing a small stream of water, to make a bridge, or culvert, as a part of the track, or road bed, and the complaint was, that the culvert was "insufficient in capacity to carry off the water in its natural course and flow in said stream, and obstructs the same," and causes the water to flow back, and submerge the lot of the plaintiff, injuring his dwelling house, stable, etc.

The Court held that the city was not liable. In considering the case, the Court cited, and commented upon a number of authorities, showing a distinction between ministerial and other forms of a municipal corporation, and the duty of exercising care in the construction of improvements made by cities, and of keeping the same in repair; and a portion of the language used by the learned judge would seem to sustain the position that a city is not liable for an injury resulting from a defect in the construction of a culvert, or vault made by another corporation, as individuals, for their sole use and benefit. The injury, however, complained of in that case did not result from a defect in the surface of the street, or sidewalk, but on the contrary, the culvert was, for all that appears, constructed with due regard for the safety of all persons passing the street, and the injury was to property situated on an adjoining lot, caused by an overflow

of water, and was entirely disconnected from the use of the street as a public thoroughfare.

The attention of the Court does not seem to have been called to a large class of well considered cases, similar to the one at bar, and while we regard the decision as correct upon the points involved in the case, we believe there may be a well-grounded distinction drawn between the questions, and facts there involved, and those in the case we are considering. The streets and sidewalks in a city are for the use of the public to walk, or drive upon at all hours, whether day or night, and all persons using them have a right to regulate their conduct upon the assumption that they are in a safe condition. *Davenport v. Ruckman and the Mayor, etc., of the City of New York*, 37 N. Y., 568.

Persons passing upon sidewalks ought not to be in constant dread of stepping into unseen vaults, and pitfalls, to the great danger of life and limb. The authorities of a city, being clothed with plenary power over streets and sidewalks, can compel persons who construct vaults for their own use to make and keep them secure, and if they are permitted to be constructed, a reasonable regard for the safety of the public would require them to exercise their power, and see that they are made safe. Where great danger may result from the failure to exercise a power given for the benefit and protection of the public, as in this case, to secure safe streets and sidewalks, greater care and diligence in the use of the power will be required; and in such case the exercise of the power becomes a duty. *The City of Logansport v. Wright*, 25 Ind., 513; *The City of New York v. Furze*, 3 Hill, 612.

An injury resulting to a person passing upon a street, or sidewalk can be readily traced to its legitimate cause, if it results from a defect in the surface, and differs from a consequential injury to property not on, or connected with the street, as in the Stackhouse case. The distinction we have attempted seems to have been in the mind of the Court when

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considering that case, as clearly indicated by the following language used in the opinion: "The complaint is not that the free use of the street was in any way obstructed, nor that the injury occurred in passing over, or otherwise using the street. Indeed, it is difficult to see that the existence of the street had any relation to the injury, as, in its absence, the culvert in the same place, if not of sufficient size to give free vent to the water flowing in the stream, would have produced the same injury."

This language conveys the impression that if the injury had resulted from a defect in the surface of the street, dangerous to persons passing over it, the ruling might have been otherwise; and the case can not therefore be regarded as settling the rule as claimed by the counsel for the defendant. This conclusion is confirmed by the many authorities, which hold that if a city permits an opening to be made in a sidewalk, she must see that it is so constructed as to secure the public from danger.

The English cases cited in *Stackhouse v. The City of Lafayette*, were all cases where the local authorities were indicted for not keeping in repair; and under the statute of 22d Henry VIII, which Lord Coke says, "was in affirmance of the common law," it was held that the indictments could not be sustained if it was proved that some other persons, lands, or body politic was bound to make such repairs. So, also, was the case there recited, of *The State v. The Inhabitants of Graham*, 37 Maine, 451.

The case of *Chicago City v. Robbins*, in the Supreme Court of the United States, 2 Black., 418, was an action on the case by the city of Chicago against Robbins, the complaint alleging that Robbins was the owner of a lot on a public street, and wrongfully made an excavation in the sidewalk adjoining, and suffered the same to remain unguarded; and that one Woodbury fell into it, and was injured, and for which injury he had recovered a judgment

against the city of Chicago, which she paid, and for which she now sued to recover of Robbins the amount paid Woodbury. The Court in deciding the case used the following language: "It is well settled that a municipal corporation having the exclusive care, and control of streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrong-doer." The case had been tried by a jury, and a verdict rendered for the defendant Robbins. The judgment was reversed by the Supreme Court, and on another trial the city recovered against Robbins, and he again brought the case before the Court, on appeal, where the questions were again considered, and the former ruling adhered to. In this case the defect was apparent to the passer by, and the Court says the excavation made by Robbins was a "private work, exclusively for his own convenience." *Robbins v. Chicago City*, 4 Wal., 657.

The case of *Davenport v. Ruckman and the Mayor, etc., of the City of New York*, before cited, was an act for injuries sustained by the plaintiff falling into an excavation extending from the front wall of a building six feet on the sidewalk, with steps leading to a cellar way in the wall of the building, which Ruckman was to put in repair. The excavation was not covered, or railed in, and had been in that condition for some time. The defect was apparent to the observation of any one, and it was held that the corporation having neglected to keep the walks in a safe condition, she was liable to the plaintiff, as was also the defendant Ruckman, and there was no objection to their being joined in one suit.

Huston and wife, v. the Mayor, etc., of New York, is a similar case, in which the defendant was also held liable.

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The case of *Wendell v. the Mayor, etc., of Troy*, 39 Barb., 329, is also directly in point, and in which it is held that if such work is for any reason tolerated by the public authorities, it is their duty to exercise a supervision over its construction, and condition, and it is negligence, and a breach of duty to omit such supervision.

The case of *Burnham v. The City of Boston*, 10 Allen, 290, was to recover for an injury sustained by driving a carriage into an excavation in the street, made by a railroad company for its track. The excavation was protected by a fence from the side approached by the street, but was unprotected on the side next to a vacant lot, across which the plaintiff drove in the night, and fell into the excavation. It was held that in the exercise of due and proper care the city should have provided a barrier, and having neglected so to do, should be liable.

The case of *Bacon v. The City of Boston*, 3 Cushing, 174, is to the same effect. The injury resulted from stepping into a cellar window constructed by the owner of the building, and which projected but a short distance into the walk. It was urged that the city was not liable, but the Court held otherwise, and that the liability was not discharged because the owner of the building was permitted to use part of the walk for a private purpose. The following cases assert the same rule: *Willard v. Newberry*, 22 Vt., 458; *Batty v. Dixbury*, 24 Vt., 155. See also *Shearman and Redfield on Negligence*, Sections 360, 400 and 407, and authorities there cited.

In view of these authorities, which are believed to be founded in good reasons, and calculated to protect the rights of the public, it was the duty of the city to use due, and proper care to see that the vault and covering was safely constructed; and she can not be released from this duty by saying, as in the second and third paragraphs of her answer, that she never had notice that the vault, and covering were

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defectively constructed. It was her duty to supervise the construction, and use due diligence, and care to see that it was made safe. The ruling of the Court in sustaining the demurrer to these paragraphs was therefore right.

The cause was tried by a jury, and a verdict rendered for the plaintiff.

Exceptions were taken by the defendant to instructions numbered *two*, *three*, and *four*, given by the Court to the jury, at the request of the plaintiffs. These instructions were as follows:

"Second. The defendant, the city of Indianapolis, is by law vested with the exclusive control of the streets and sidewalks within the city limits, and is bound to keep the same in a safe, and passable condition for foot passengers, and if it fails to do so, and a person using ordinary care to avoid injury is injured, the city is liable in damages.

"Third. The city has not performed her whole duty when she has required vaults, or openings in the sidewalks to be constructed safely in the first place, but she is bound to maintain, and keep them in a safe condition at all times.

"Fourth. The jury may presume that the city has notice of any defect in a sidewalk when the same has been left in an unsafe, or dangerous condition for a considerable time without being repaired."

Negligence on the part of the city is the gist of the action, and must be affirmatively shown to entitle the plaintiff to recover. The mere existence of a latent defect is not enough to charge the corporation with negligence. The corporation must in some way be at fault in connection with the defect. On the presumption that the city permitted the construction of the vault, we have already stated the rule to be that it was her duty to supervise its construction, and to use due care to see that it was made safe in the first instance. If there was any evidence in the cause tending to show a defect in the original construction of the vault, so far as the instruc-

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IN GENERAL TERM, 1872.

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All persons in using the streets and sidewalks have the right to assume that they are in a good, and safe condition, and to regulate their conduct upon that assumption.

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Proof of the mere existence of a latent defect in a sidewalk, in a city, is not enough to charge the corporation with negligence; the corporation must in some way be in fault in connection with the defect, and if the defect does not originate in the construction, express notice of the defect, or negligence of duty in not ascertaining and remedying it, must be shown, else the city will not be liable to repair. Hence it is not enough, to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on her part, she was injured.

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BLAIR, J.—The complaint in this case, after alleging that it is the duty of the city of Indianapolis to keep the streets and sidewalks in good, safe repair, charges that a certain opening in the sidewalk on West New York street, in said city, in front of the property owned by the defendant, Mary Edgar, was constructed without using due care to make the same safe, and was insecurely covered, and the cover "having been insecurely fastened, and the support beneath the same having worn away, and fallen out." As the plaintiff, Emma M. Kenyon, the wife of Horace F. Kenyon, was passing along the sidewalk, and having no knowledge of the unsafe condition of the cover, she stepped on the same when it gave way, and turned beneath her, causing her to fall through the opening into the vault beneath, whereby she was injured, etc.

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If the vault, and covering was constructed in the sidewalk, over which the defendant had exclusive control, we may, in the absence of any allegation that objections were made, infer that it was done under an implied license from the city authorities. *Robbins v. Chicago City*, 4 Wal. 657.

The question raised by the demurrer may therefore be stated as follows: If the city permits the owner of property abutting a public street to construct a vault under the sidewalk, with an opening in the walk, for the sole use of the owner of the property, is the city bound to see that it is constructed with due care for the safety of the public having a right to pass, and repass over the walk?

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NOTE.—He who disturbs the surface of the highway, and makes openings in it, is an insurer of all persons who pass over the opening, however carefully protected. 5 *Duer*, 495; 18 *N. Y. R.*, 79, 85.

He is responsible for all injuries resulting from its want of entire safety, for all the purposes for which the public have a right to use such sidewalk. *Same*.

Nor is he protected by showing that the covering had answered the purpose for which it was intended for a year after the completion of the work, and that he had no knowledge that the covering was insufficient. *Same*.

The question of negligence does not arise. *Same*.

A municipal corporation, possessing the legal power, and furnished with the means to construct, and keep in repair highways, and streets within their jurisdiction, are liable to every one who may be injured by their neglect to repair defects therein after notice. 10 *Bow v. H.*, 20, and cases cited therein; 3 *Black.*, 590. See also 1 *Black.*, 39, 51, 52, 54; 5 *N. Y.*, 369; 17 *do.*, 104; 37 *do.*, 568.

In an action against a city municipal corporation for damages, sustained by reason of a grate over an opening in a sidewalk being in a defective or unsafe condition, it is not enough to entitle the plaintiff to recover to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on his part, he was injured. Notice to the defendant of the defect, or negligence of duty, in not ascertaining and remedying it must be shown. 5 *Duer*, 674. See also 3 *Hill*, 612; 2 *Barn. & Ald.*, 179; *Wilson v. the Mayor, etc.*, 1 *Denio*, 595.

Where the streets and avenues of a city are negligently suffered to become and remain out of repair, the corporation is liable for injuries sustained by persons through such negligence. 9 *N. Y.*, 162, and cases therein cited.

Negligence must be affirmatively shown, and the mere existence in a highway of an obstruction, or other defect, is not enough to establish negligence in the corporation—*Shearman & Redfield, on Negligence*, 81, 147. If the corporation has a knowledge of a defect, and permits it to remain, it is then liable for the consequences of their negligence. 48 *Penn.*, 320; 36 *Barb.*, 226. See also 39 *Barb.*, 829.

If the defect in a lawful structure is latent, either express notice of it must be brought home to the corporation, or the defect must be so notorious as to be evident to all who have any occasion to pass the place, and observe the premises—*Shearman & Redfield, on Negligence*, Sec. 148, and authorities cited—in which case the corporation is charged with constructive notice, being in fault for not knowing the fact. See also 37 *N. Y.*, 568.

“A municipal corporation, which has been compelled to pay damages to one injured by falling into an unguarded area made by the defendant, has a remedy against the latter for re-payment”—23 *Pick.*, 24; 4 *Cush.*, 275; 9 *Allen*, 17. If, however, the damages resulted from an act for which they

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were liable in law, they can have no recourse over against the actual wrong doer. 35 Penn. St., 284.

Where a duty, or obligation is once fixed upon a party, a corresponding liability is involved to pay damages resulting from a neglect of such duty. 13 Iowa, 181.

"It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others." *Law Rep.*, 2 Com. Pleas Cases, 371, 374. "Negligence alone will not do, unless some breach of duty is shown." *Law Rep.*, 3 C. P., 495, 498. See also 10 Meeson & Welsby's Rep., 109; 10 Common Bench Rep., (N. S.), 213.

If "without fault on the part of the owner, the cover, fence, or guard is removed or placed in a dangerous position, the owner is not liable until he has had actual, or constructive notice of the fact, and has had reasonable opportunity to put it right." *Shearman & Redf., on Neg., Sec. 360*; 3 *Carrington & Payne's Rep.*, 362.

In an action against the owner of a coal vault for injuries received by a person falling through an insecure grating leading to such vault, the Court charged—

"First, That the law imposed upon the owner of property in a city, who used any part of the street for his private purpose, the duty of employing all necessary, and proper means for the prevention of damages and injury that might arise from the use of such public street by him, and he is responsible for all injury resulting from the street being made thereby less safe for its proper use, when there is no negligence on the part of the party injured.

"Second, If the grating was insecure at the time of the happening of the accident, and that was occasioned by the negligence of the defendant, he is liable; for being the owner of the property, he was bound to see that the grating was kept securely.

"Fourth, If the defendant did not resort to all necessary, and proper means to render the grating secure, and its insecurity had existed and continued for a considerable time previous to the action, he is liable.

"Sixth, The defendant would not be liable, if the grating had been secured by him previously, and the security had been removed by the tenant, or any one else."

This charge was sustained. See 26 How. Pr., 105.

"Though the corporation may impose upon the owners of lots fronting upon the streets, or avenues the burden of paving and keeping the sidewalks in repair, they do not thereby relieve themselves of the duty imposed upon them by charter, and by statute, of altering, amending, and keeping in repair the streets and highways within the city." *Wallace v. Mayor, etc., of N. Y.*, 2 Hill, 440. See also 3 Cush., 174.

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In *Hall v. Manchester*, 40 *N. H.*, 410, it was held that the city was properly liable for an injury sustained from a defect in a sidewalk, provided the defect was one of which the city could reasonably have had knowledge, and the plaintiff, on her part, was in the exercise of due prudence and care.

In *Raymond v. Lowell*, 6 *Cush.*, 524, it was held that the projection of the movable grating of a culvert from one to two inches above the level of the edge of the sidewalk, against which it rested, was not a defect showing such a want of ordinary care on the part of the city, as would make it responsible for an injury occasioned by stumbling over the grating.

The principles of this last decision are extended in the case of *Hixon v. Lowell*, 13 *Gray*, 59, in which the Court held, that "in most cases the town has discharged its duty when it has made the surface of the ground over which the traveler passes, sufficiently smooth, level, and guarded by railings, to enable him to travel with safety, and convenience by the exercise of ordinary care on his part. There may be many causes of injury, to which he might be exposed in traveling upon such a way, which would not constitute any defect, or want of repair in the way itself. The town, if it has done its duty in making the way safe, and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it."

In all cases, "before a municipal corporation can be made liable for injury caused by a defect in a highway, not arising from its construction, or by an obstruction placed therein by a wrong doer, either express notice of the existence of the nuisance must be brought home to it, or the defect must be so notorious as to be observable by all, in which case the corporation is charged with constructive notice, being in fault for not knowing the fact." *Shear. & Redf. on Neg.*, Sec. 407. See also 4 *Wallace*, 189; 9 *N. Y.*, 456; 1 *Disney*, 532; 15 *Mich.*, 307; 33 *Ala.*, (N. S.), 116; 41 *N. H.*, 135; *Verm.*, 438; 1 *Mass.*, 153; 20 *Conn.*, 118; 6 *Am. Law Reg.* tit. "Highway," and "Municipal Corporation." See *Dillon on Municipal Corporations*.—[REPORTER.

Farman v. Ratcliff *et al.*

IN GENERAL TERM, 1872.

FRANCIS L. FARMAN, Appellant, v. CHARLES L. RATCLIFF
et al.

Appeal from BLAIR, Judge.

A mechanic may waive his lien by delivering the goods before payment, or accepting security for their price. His refusal to deliver on demand in the latter case, will not work a conversion of the goods, if such refusal was, by reason of his ignorance as to whether or not the debt was secured, nor can the person in such case, making the demand, recover the price of the goods because of such refusal.

On a demand for goods, the payment of which has been secured at a distant day, the manufacturer, when he is not in a condition to know, will be entitled to a reasonable time to ascertain the character of such security, before delivering the goods.

J. S. Harvey, for appellant.

Beck & Cale, for appellees.

RAND, J.—This was a suit for the recovery of the value of certain articles manufactured by defendants for plaintiff, at his request.

The cause was tried at Special Term by the Court, and finding and judgment for defendants.

The facts are as follows: The plaintiff, who resides in Indianapolis, went to Cincinnati, and employed the defendants, who were mechanics, and machinists at that place, to manufacture certain articles which plaintiff wished to use in his business. The defendants agreed to manufacture the articles, and plaintiff agreed to pay for the same on delivery. The articles were manufactured, and the plaintiff was notified

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that they were ready for delivery. Plaintiff failed, for some reason not disclosed in the record, to pay for them, and defendants sued him in Cincinnati, and recovered judgment for their price. Afterward defendants sued plaintiff here on the transcript of the judgment obtained in Cincinnati, and obtained a judgment here which the plaintiff replevied, but did not pay, and went to Cincinnati, and demanded possession of the manufactured articles. The plaintiff says: "I asked him (Ratcliff) if the things were ready, saying I had come for them. He then asked me if I had given security for their claim. I told him that the matter was in the hands of his lawyers. He then said I could not have them until he saw Mac. I then again demanded the goods in their office. He made no answer. He then walked out on the sidewalk. I followed him, and after reaching the sidewalk, I again demanded of him to deliver to me the articles. He made no answer, but without making any remark, walked down the street, and I did not see him any more."

The defendant, Ratcliff, testifies as follows: "He called at my shop, and he asked me could he have those machines, and I told him he could have the machines, but I would have to see my attorney first, but not before I saw my attorney. There were two men in his company on that occasion, whose names I do not know, and there was no person else present. He brought no vehicle to take the goods away. He said when he came he wanted to get those things, and I told him he could not have them until I saw my lawyer. I went to see Mr. Kline to stay at my shop while I was absent; and I could not find Kline, and I returned to the shop, and found Farman and his two friends gone. I was gone from the shop not more than a minute. I then immediately went and saw my lawyer, and within ten minutes returned to the shop. I then gave instructions to my workmen to deliver the goods to plaintiff, or his agent, if they should return. He, nor they never returned to the shop since."

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It is a well settled principle of law, that a mechanic has a *lien* upon the manufactured goods for the price, unless he waives it. This he may do by delivery of the goods before payment, or accepting security on time. The evidence in this case establishes the facts that the goods were to be paid for on delivery, and that defendants refused to deliver them because they were not paid for. Defendants sued plaintiff, and recovered a judgment for the price, which judgment plaintiff replevied, and then demands the goods.

The plaintiff's and defendant's testimony, above quoted, shows some discrepancy as to what took place at this last demand. But to give it the most favorable construction for the plaintiff, it shows that defendant declined to waive his lien until he had received his pay, or the debt was secured. He asked plaintiff if he had secured the debt, but plaintiff, instead of informing him he had replevied the judgment, said it was in the hands of his lawyer. Defendant then said he must see his lawyer before he would surrender the goods, and immediately went to see him, and when he returned, after an absence of about ten minutes, plaintiff was gone. In such a case, the defendant was entitled to reasonable time to see his attorney. 2 Hilliard on Torts, page 121.

We do not think the refusal such a one as to amount to a conversion of the goods, nor can the plaintiff recover the price of the goods because of such refusal.

The Judge trying the case so found, and we can not disturb the finding.

We do not think it necessary in this case to decide whether the plaintiff's replevying the judgment was a discharge of the defendant's lien on the goods.

Judgment affirmed.

NOTE.—A vendor who takes a bill of exchange, or promissory note, as a security for the price, loses his lien—1 *Camp.*, 427; 3 *Scott*, 298; 2 *Bing.* (N. C.) 785; 2 *Hodges*, 51—and it has been held—4 *B. & Ad.*, 568; 2 *C. & M.*,

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505, 512—that the lien does not revive on the dishonor of the instrument, if it be then outstanding in the hands of a third person, although it would be otherwise if it were then in the hands of the vendor himself. 1 *M. & S.*, 535, 544; 3 *C. B.*, 808, 829.

The general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery, or payment, there still results to the vendor, out of the original contract, a right to retain the goods until payment of the price. 2 *Pick.*, 212, 515; 6 *Pick.*, 280; *Newball v. Vargas*, 15 *Maine*, 315.

See Sedgwick on Damages, p. 288 *et seq.*

"If the plaintiff recovers the value of the property, and the judgment is satisfied, there would seem to be no doubt that the title to the property should, and does vest in the defendant, he having paid its value—3 *Barnwell & Creswell's Rep.*, 196. But how far this transfer of title depends on the judgment, and how far on its satisfaction, seems by no means clear; and the better opinion would appear to be, that if the judgment is not for the value of the property, or if it remain unpaid, the title is unaltered. *Sedgwick on Damages*, 575. See also *Barb v. Fish*, 8 *Blackf.*, 481; 8 *Cowen*, 43; 3 *Common Bench Rep.*, 266.

The obtaining of the value by the plaintiff operates as a transfer of the title from the time of the conversion. 18 *Md.*, 468.—[REPORTED.]

IN GENERAL TERM, 1872.

ANNIE PAETZ v. THOMAS DAIN, Appellant.

Appeal from RAND, Judge.

ARREST—*what is cause for—*

FALSE IMPRISONMENT—*damage for.*

"Probable cause" will justify an officer in making an arrest, and the imprisonment of the offender, and if there is probable cause to believe that a person is insane, and is about to commit any mischief, which, if committed by a sane person, would constitute a criminal offense, such

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officer may detain the offender until it may reasonably be presumed that he has changed his purpose.

J. S. Harvey, for appellant.

Gordon, Brown & Lamb, for appellee.

BLAIR, J.—The plaintiff, who is a married woman, charges in her complaint, that the defendant, without any reasonable, or probable cause, arrested her, using great force, striking her, and tearing her clothes, and put her in the city prison, where she was imprisoned in a cell, in close custody, &c., for which she seeks to recover. The action was brought against the defendant Dain, and four others, but dismissed by the plaintiff before trial as to all except Dain.

The answer was in two paragraphs—the *first*, a general denial, and *second*, that the defendant was a policeman of the city of Indianapolis, and about two o'clock in the night time he found the defendant in the streets of said city, hallooing, and screaming, and threatening to break in the windows of a house with a club, and in such a state of excitement as to appear to be insane, and would not tell the place of her residence, and she was then taken to the station house, when her husband was sent for, and he took her home, and this is the grievance complained of.

The cause was tried by jury at Special Term, and a verdict rendered for the plaintiff in the sum of fifty dollars. A motion of the defendant for a new trial was overruled, excepted to, and an appeal taken to General Term. The Court gave the jury the following instruction, which it is claimed does not state the law correctly:

Second, If you believe from the evidence that defendant, without probable cause, arrested, and imprisoned plaintiff, then the law is for the plaintiff. But if you believe from the evidence that the defendant acted in good faith, and the plaintiff, by her boisterous, and excited manner, and by her

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threats to break windows gave the defendant good ground to believe that she was insane, and would carry out her threats, then defendant would be justified in arresting her, and if he thought she was insane, it was his duty to take her home if he knew it, but if he did not know where her home was, then he would have the right to take her to the station house. But if he knew where her residence was, he was not justified in taking her to the station house.

Any person may lawfully lay hold of a lunatic, or insane person about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence, and detain him until it may reasonably be presumed that he has changed his purpose—4 Bl. Com., 293 N. The evidence in the case before us shows that the plaintiff was in the street, in front of a saloon, where she said her husband was drinking, singing, and spending his money, while her children were at home suffering from want. She admits that she was excited, and there was some evidence tending to show that she threatened violence to the door, or window of the saloon, but she desisted from that purpose when approached by the defendant, and she informed him what she wanted, that she wanted her husband out of the saloon. The defendant went into the saloon, and returning reported that her husband was not in there. She insisting that he was, was taken into custody, and taken to the station house, passing by the place where she resided, pointing to it, and asking to be taken home to her children. Several witnesses say no violence was used, but the testimony of the defendant discloses the fact that there was struggling, and her dress became disarranged. Arrived at the station house, she still insisted on being taken to her children, who were alone. She was put in a cell, and the defendant, and three others started in search of her husband (the defendant stopping at a saloon on the way to get a drink.) The husband was found at the saloon in front of which the plaintiff had been, and he immediately

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went to the station house, the plaintiff was released, and she and her husband returned home.

We think, as applied to the evidence, the instruction was correct. The plaintiff was in anguish, and distress, but we see no reasonable grounds for supposing that she was insane, and after she pointed to her home, which was between the saloon and the station house, there was no reason why she should have been confined, even for a moment, in a cell. She had violated no law of the State, nor ordinance of the city, so far as was shown in the cause. The instruction left the question with the jury to find whether or not, the defendant knew where her home was, and they were told, if he did not know, he had a right to take her to the station house. We think it is as favorable toward the defendant as the evidence would justify, and he can not complain.

The judgment is affirmed.

NOTE.—Evidence is admissible in mitigation of damages that the defendant had ground to suspect that the plaintiff was guilty of the offense for which the arrest was made. *Rogers v. Wilson, Minor*, 407

The question as to what is a reasonable, and probable ground for suspicion is a mixed proposition of law, and fact. Whether the circumstances alleged to show it reasonable, or not, are true, and existed, and the inferences drawn from them warranted, is a matter of fact for the consideration of the jury; but whether, supposing them true, they amount to a reasonable ground for suspicion, is a question of law for the opinion of the Judge. *Panton v. Williams*, 1 *Gale & Davison's Rep.*, K. B., 504; 2 *Adolphus & Ellis' Rep.*, K. B., (n. s.), 69.

When the circumstances are such that a person must know why a man is about to apprehend him, he need not be told why, and the arrest will be legal, and the resistance illegal, as much so as if he had been told. 2 *Hale's P. C.*, 82, and n

Any person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence, and there seems no difference between the power of an officer, and that of a private individual in this respect. 2 *Hawkins*, Ch. 13, Sec. 8. See also *Roscoe's Crim. Ev.*, 239; *Foster's Cr. L.*, 272, 311.

(Under the New York Code, a justification on the ground that the defendant had reason to suspect that a criminal offense had been committed by the

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plaintiff must be pleaded specially, and the answers must first show the actual commission of an offense, and then the cause to suspect the plaintiff of its commission. If less than this is pleaded, or if the evidence comes short of this, it can only go to the question of damages. *Brown v. Chadrey*, 39 Barb.) See 2 Greenl. Ev., 237, 238, 274.

The jury are to consider *inter alia* in the estimation of damages, bodily sufferings, mental agony, injury to reputation, the circumstances of indignity, and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act, and tending to the plaintiff's discomfort. 2 Greenl. Ev., Sec. 267, and authorities cited.

"Where an authority, or license is given by law, and the party exceeds, or abuses it, though without intending so to do, yet he is a trespasser *ab initio*, and damages are to be given for all that he has done, though some part of it, had he done nothing more, might have been lawful." 2 Greenl. Ev., Sec. 270, and cases cited.

"If there was on the part of the defendant a want of probable cause, yet if he acted under a mistaken sense of duty, and without any intention of oppression, it was at most a case for compensatory, and not for vindictive damages." 3 Story, 1. See also *Sedgwick on Damages*, 521, *et seq.*

"Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages, but he can claim no further exemption where his acts are clearly against law." *Same*, 522.

"In vindictive actions, such as 'false imprisonment,' it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant. *Same*, 521, 3, 4, 5. See also 4 Wend., 113, 139—but vindictive damages can not be allowed where the wrong results from an error of judgment only—14 La Ann, 806, and notes on page 528, *et seq.* *Sedgwick on Damages*. See also 1 Leading Crim. Cases, (B. & H.) 177 and notes; 194, 195, and notes; 202, and notes.—[REPORTER.

Schaw v. Dietrichs et al.

IN GENERAL TERM, 1872.

CHRISTIAN SCHAW v. WILLIAM DIETRICHs, CHARLES COULON,
CHARLES G. COULON, HANS BLUME.

Appeal from RAND, Judge.

JUSTICE OF THE PEACE—*malfeasance of—writs issued by,
must be to duly appointed officers—*
CONSTABLE—*when persons acting as, liable for trespass—*
ARREST AND FALSE IMPRISONMENT—*when ministerial officers
and others are liable for.*

The provisions of the statute requiring a Justice of the Peace to record the appointment of a special constable on his docket, and to direct process to him by name, are imperative, and not directory.

A writ directed "to any Constable of the County, &c.," will not justify a trespass committed by such *special* Constable in attempting to serve such writ.

Parties acting at the instance of any one assuming the duties of a ministerial office, are bound to know whether he is in fact such officer, and whether he in fact bears that authority.

— *Klingensmith*, for appellants.

Baker, and Gordon, Brown & Lamb for appellee.

NEWCOMB, J.—Dietrichs, as a Justice of the Peace, issued his warrant for the arrest of Schaw, the plaintiff in this case, to answer a charge of provoking one Smith to commit an assault and battery on him, Schaw, duly made under oath before said Justice. The writ was directed to "any constable of Marion county," but instead of being delivered to a constable, it was handed by the Justice to Charles G. Cou-

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lon, who appears in the subsequent proceedings under the name of a special constable.

Coulon arrested Schaw, and brought him before the Justice. Soon after he was brought into the office of the Justice, the latter went to his dinner, Charles G. Coulon leaving at the same time. The Justice, and Coulon left the plaintiff in charge of Blume, who was a clerk in Dietrich's office. While they were absent the plaintiff started out of the office. Blume undertook to restrain him from going, and called for help, whereupon Charles Coulon, who was prosecuting the "provoke" case, came out of his own into the Justice's office, and ordered plaintiff to sit down, and behave himself until Esquire Dietrichs should return. Thereupon the plaintiff resumed his seat, and awaited the coming of the Justice. The weight of evidence is that Schaw was drunk when brought before the Justice, and on his return the latter issued a mittimus for the commitment of the former to jail, reciting in the mittimus that the trial of the charge was necessarily postponed by reason of the drunkenness of Schaw, and he having failed to give bail for his appearance in the sum of fifty dollars, the jailor was commanded to receive said Christian Schaw into his custody in the jail of said county, there to remain until discharged by due course of law.

Schaw was kept in jail until the next day, when, on the order of Justice Dietrichs, he was brought out, and the prosecution pending against him terminated in a finding of guilty, and a nominal fine, with costs. No record of the proceedings was made in the docket of Justice Dietrichs for more than a month afterward.

After his release, Schaw brought this suit for the alleged assault, arrest, and imprisonment. Dietrichs filed the general denial, and a second paragraph of answer, setting up the above recited proceedings before him against plaintiff, as a defense.

The other defendant, pleaded the general denial separately.

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Charles G. Coulon filed a second paragraph, justifying under the writ issued, and delivered to him by the Justice. The other defendants answered further in justification, that they acted as citizens under the command of Charles G. Coulon, as special constable.

The Court at Special Term sustained demurrers to all the special answers, to which defendants severally excepted. The cause was tried by jury—verdict against all the defendants for \$500 damages. The defendants filed separate motions for a new trial. The plaintiff remitted \$250 of the verdict, whereupon the Court overruled the motion for a new trial, and rendered judgment on the verdict.

The only real question presented by the record is, did the writ delivered by the Justice to Charles G. Coulon authorize him to arrest the plaintiff? If it did, the Justice acquired jurisdiction of the person of plaintiff, and such jurisdiction protected him from suit for subsequent irregularities; and the other defendants could justify under the writ. On the other hand, if the writ gave Charles G. Coulon no authority to make the arrest, he, and all others acting in the premises under his orders, as well as the Justice who committed plaintiff to jail after his arrest, are trespassers.

The statute defining the powers of Justices in State prosecutions—2 G. & H., 639—provides that special constables may be appointed under like circumstances, and such appointment impose like liabilities as in civil cases. The statute relative to such appointments in civil cases is as follows:

“Whenever there shall be no constable convenient, and in the opinion of the Justice an emergency exists for the immediate appointment of one, such Justice may appoint a special constable to act in a particular cause, and shall note such appointment and such cause on the docket, *and shall direct process to him by his name* and such constable so appointed shall discharge the duties, receive the fees, and

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have the powers, in such cause, appertaining to the office." 2 G. & H., 607.

This statute was passed upon by the Supreme Court in *Benninghoof v. Finney et al*, 22 Ind., 101, where it was held that the provisions of the statute requiring the Justice to note the appointment of a special constable on his docket, and to direct process to him by name, are imperative, and directory, and that a writ directed to any constable of the county, &c., will not justify a trespass committed by such special constable in attempting to serve such writ. Under that decision, the defendants in this case were clearly trespassers in restraining the plaintiff of his liberty. No jurisdiction of his person was obtained, nor did he voluntarily submit to the jurisdiction of the Justice. Indeed, the Justice's mittimus recites that he was too drunk to be tried. If so, he was too drunk to submit himself to the jurisdiction of the Justice, nor did he do so. He attempted to leave the Justice's office, but was restrained from doing so by the defendants Blume, and Charles Coulon. They were bound to know whether Charles G. Coulon was a regular constable, or if they acted under his orders as a special constable, they were bound to know whether he in fact bore that authority.

The ruling of the Judge at Special Term on the demurrers, and in overruling the motion for a new trial, were therefore right, and the judgment is affirmed, with costs.

NOTE.—In all cases where the cause of action against a judicial officer, exercising only a special, and limited authority, is founded on his acts done *colore officii*, the single inquiry is, whether he has acted without any jurisdiction over the subject matter, or has been guilty of an excess of jurisdiction. 1 *Leading Criminal Cases*, 306. See also 1 *Chitty, Pl.*, (14 Am. Ed.), 181, *et seq.*, and notes; 7 *Conn.*, 11, 95; 3 *Binney*, 404; 3 *Campbell*, 388; 15 *Johnson*, 121; 19 *do.*, 39; 7 *Wallace*, 523, 535.

If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice*, and void, and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case,

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he thereby becomes a trespasser. *Same*, and 2 *Gray*, 410; 3 *Wend.*, 202; 1 *Pet. U. S.*, 138; 1 *Wend.*, 126; 6 *do.*, 382; 4 *John*, 450.

With regard to inferior Courts, as compared with those of general jurisdiction, it is for them, when claiming any right, or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. *Peacock v. Bell*, 1 *Saunders*, 74, and notes; 19 *Johnson*, 33, 34. *See Thaffe v. Downes*, 3 *Moore Com. Pleas. Rep.*, 41, and note 2; 1 *Leading Crim. Cases*, (B. & H.), 320; 5 *Wend.*, 170; 12 *John.*, 257; 8 *Metcalf*, 326; 7 *do.*, 257; 14 *Conn.*, 200; 20 *Wend.*, 236; 12 *Vermont*, 661.

Justices of the Peace have always been held responsible to individuals, in civil suits, for all the injurious consequences arising from every illegal act they may have done, either in the adjudication of causes of which they had no jurisdiction, or in the exercise of their ministerial powers, or in the discharge of their ministerial duties. 1 *Gray*, 1: and note, p. 325, 2 *Leading Crim. Cases*.

If the want of jurisdiction over a particular case, is caused by matters of fact, it must be made to appear that they were known, or ought to have been known to the Judge, or Magistrate, in order to hold him liable for acts done without jurisdiction. 2 *Gray*, 410, 412.

If the act of a Justice, issuing a warrant, be invalid on the ground that the party to whom issued was not duly authorized to receive, and execute it, all persons who act in the execution of the warrant will act without any authority; a Constable who arrests, and a jailor who receives a felon, will each be a trespasser, resistance to them will be lawful, everything done by either of them will be unlawful, and a Constable, or persons aiding him, may, in some possible instance, become amenable, even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. p. 3282 *Leading Crim. Cases*. *See also* 3 *Moore, C. P.*, 382; 10 *Wend.*, 128; 19 *Vt.*, 151. *See* 1 *Chitty Pl.*, (14 *Am. Ed.*) 184.

Requiring the Justice to insert in a record the process of every proceeding before him, and its final determination. *See* 11 *Allen*, 33, in case of *Kelly v. Dresser*; 4 *Metcalf*, 421.

Any general authority by Justices to fill up, or alter process would be void, and highly improper. 18 *Johns.*, 405.

When he exceeds his jurisdiction, responsibility attaches. 3 *Cranch.*, 331; 2 *Blackf.*, 429.

A Constable, whose office is wholly ministerial, may appoint a deputy to execute a warrant directed to him, * * but he can not make a deputy without some special cause. 2 *Hawk., Ch.*, 10 *Sec.* 36; 3 *Burr.*, 1259; 1 *Term Rep.*, 682. *See also* 1 *Leading Crim. Cases*, 202, and notes.

If a warrant be directed to the Sheriff, he may command his bailiff, or other sworn and known officer to serve it, without writing any precept; but if he will command another man, that is no such officer, to serve it, he must

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give him a written precept, otherwise an action of false imprisonment will lie. *Note 3, 2 Hale's Pl. Cr.*, 110.

A Constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit, the father staying behind. In coming up to the prisoner, one of the sons laid hold of him, and was stabbed by the prisoner. The father was in sight. *Held by Parks, B.*—The arrest was illegal, the father being too far away to be assisting in it. *Same*, p. 115.

Liability of Justice for acts of special Constable, see *Sec. 111, 2 G. & H.*, 608

Powers, and duties of constables. *2 G. & H.*, 617, and notes.

The law does not hold out the same indemnity to private persons as it does to Constables and other peace officers who are *ex officio* not merely permitted, but enjoined by law to arrest offenders. *1 Russ on Cr.*, 594. The party taking upon himself to execute process, whether by writ, or warrant, must be a legal officer for that purpose—*Same*, 614; *1 Hale Pl. Cr.*, 457, 458, 459—and it must be executed by the party named in it, or by some one assisting such party. *Same*, 615, 616, and notes. See also *1 Leading Crim. Cases*, 202, and notes.—[REPORTER.

IN GENERAL TERM, 1872.

GEORGE W. BENNETT v. GEORGE W. BAKER ET AL, Ap-
pellants.

Appeal from RAND, Judge.

PLEADING—*amendment of*—

BILL OF EXCEPTIONS—*when, and how defective.*

It is within the discretion of the Court to allow an amendment to a complaint during the progress of the trial.

An amendment will not work a delay in the trial, unless it is shown by

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affidavit that the defendant is prejudiced thereby in his preparation for the trial.

A bill of exceptions contained the following statement:

"The plaintiff then introduced the following evidence, (here insert all the evidence), which was all the evidence given in said cause"—

Held: that evidence can not be made a part of a "bill of exceptions" in this way, although there are papers which appear to be notes of evidence, yet bear no marks of filing, and nothing to show an agreement of parties, that they contain the evidence.

Bradbury & Bloomer, for appellant.

Hanna & Kneffler, for appellee.

BLAIR, J.—The complaint in this case was a common count for work, and labor done for the defendants. Issues were joined in the complaint, and the cause submitted to the Court for trial, and after a portion of the evidence of the plaintiff was heard, the plaintiff, by leave of Court, filed a second paragraph of complaint, alleging that the work, and labor was done for the defendants under a written contract, which was made a part of the second paragraph. To this the defendants objected, for three reasons, as set out in the bill of exceptions:

First, Said amendment made an entirely new cause of action, and one which the defendants were wholly unprepared to meet, and defend.

Second, That it was too late to make the amendment after the trial had commenced.

Third, That the amendment was a departure from the original cause of action.

The reasons urged against the amendment allowed by the Court, were not well founded. It was within the discretion of the Court to allow the amendment to be made, and Sections 97, and 98, of the Code, 2 G. & H., page 117, provide that "No cause shall be delayed by reason of an amendment, excepting only the time to make up issues, but upon good

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cause shown by affidavit of the party, or his agent, asking such delay"—"And the affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial by the amendment."

We see no error in overruling the defendants' objections.

Issues were joined on the second paragraph of complaint, and the trial proceeded. Objection was made by the defendants to the introduction in evidence by the plaintiff, of the written contract, filed with the second paragraph of complaint, for the reason that it was immaterial, and incompetent, having been offered in evidence in a former trial between the same parties, for the same services for which plaintiff now seeks to recover.

We know of no rule by which the evidence could have been excluded at the time it was offered by the plaintiff, for the reasons given by the defendants, and it was properly admitted in evidence. The bill of exceptions also says that the defendants objected to all of plaintiff's evidence, and every part thereof, for similar reasons. There is nothing in this objection. It is also set out in the bill of exceptions, that the defendants offered to prove by William B. Green that in a former trial "between these parties, these defendants offered to go into the trial of all the issues made by the pleadings in the cause, and for that purpose propounded the following questions to William B. Green, a competent witness, to-wit: "If all the allegations in the complaint were inquired into in the former trial in this Court, you may so state?"

"If objections were made to the trial of all the issues embraced in the complaint, and answer in the trial of the former case between these parties, you may so state, and by whom made?"

The plaintiff objected to the proposed evidence, and the objection was sustained by the Court.

We can not see the relevancy of the evidence proposed,

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nor what was intended to be proven by the defendants, and are of opinion that it was not error to exclude it.

Judgment was rendered for the plaintiff, and the defendants moved for a new trial for the following reasons:

First, Error of the Court in assessing the amount of recovery.

Second, The damages are excessive.

Third, The finding of the Court is not sustained by the evidence.

Fourth, That the finding of the Court is contrary to law.

Fifth, The rejecting evidence offered by the defendants, that should have been received.

Sixth, For receiving evidence offered by the plaintiff that should have been rejected.

Seventh, For sustaining the attachment against the property of the defendants in the absence of any evidence to warrant it.

The bill of exceptions contains the following statement: "The plaintiff then introduced the following evidence, (here insert all the evidence), which was all the evidence given in said cause."

Evidence can not be made a part of a bill of exceptions in this way. 2 G. & H., page 209, Sec. 343. There are papers which look like they might be notes of evidence in the cause. There are no marks of filing, or anything in the record showing there has been an agreement of the parties that they contain the evidence. See also in this connection, *Mills v. Simmons*, 10 Ind., 164.

Hence no question can be considered by the Court in connection with the evidence, and this disposes of the reasons assigned under the *first*, *second*, *third*, *fourth*, and *seventh* specifications of the motion for a new trial. The *fifth* and *sixth* have already been disposed of.

The judgment is affirmed.

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NOTE.—The only question in regard to the admissibility of an amendment of the pleading now is, whether it introduces another, and distinct cause of controversy. If it does not, but the original cause of action, or ground of title, or defense is adhered to, the allegations, and pleadings may be amended. 2 *Greenl. Ev.*, Sec. 11 b., and authorities cited; 3 *Mass.*, 208; 5 *Pick.*, 304; 5 *Binn.*, 53; 1 *Blackf.*, 170.

See also concerning amendments—2 *Blackf.*, 420; 5 *do.*, 84, 300, 374, 566, 571; 6 *do.*, 80, 419, 456, and 8 *do.*, 393, 503.

The statutes of amendment were designed to meet variances arising from accidental slips, and not to extend to cases where the pleading has been intentionally, and deliberately, but erroneously framed. 2 *Carriington & Kirwan Reps.*, 373.

The English Courts have refused amendments where the object was merely to supply material omissions, as well as where the amendment will probably deprive the defendant of a good defense, which he otherwise might have made, or would probably require new pleadings, or would introduce a transaction entirely different from that stated in the plea. 2 *Greenl. Ev.*, Sec. 11 c, and cases cited.

The Judge's discretion, in allowing, or refusing amendments, like the exercise of judicial discretion in other cases, can not in general be reviewed by any other tribunal. 1 *Greenl. Ev.*, Sec. 73, and authorities cited. American cases cited in 1 *Metcalf & Perkins' Digests*, p. 142, 166.

As to amendments at the trial, in case of variance in setting out written instruments, see 1 *Chitty Pl.*, 14 *Am. Ed.*, 319, and note Y; *Tidd's Practice*, 9th *Ed.*, tit. amendment.

Defects in pleading, when, and how aided. See 1 *Chitty Pl.*, 14th *Am. Ed.*, 671, and notes.—[REPORTER.

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by them as real estate agents, and brokers, for negotiation of defendant's real estate to one Pearson. The case was instituted before a Justice of the Peace, and judgment by default against defendant. After the time of appeal from the Justice's judgment had elapsed, defendant moved for an order, at Special Term, granting him an appeal. The court, after a motion by plaintiffs to dismiss the appeal, overruled, was tried at Special Term by a jury, and a verdict in favor of the plaintiffs, and there was a judgment on the verdict over defendant's motion for a new trial, and an appeal was taken to General Term. The assignments of error are:

1. The Court erred in instructing the jury.

2. In overruling the motion for a new trial.

The reasons assigned for a new trial are, that the verdict of the jury is not according to law—is contrary to the law, and is not supported by the evidence; also that the Court erred in instructing the jury.

The evidence is not in the record, and it would be difficult for the Court to say that the verdict is contrary to the law, or that it is not sustained by the evidence.

The instructions complained of, might have been applicable to the evidence given to the jury, and if so, we can not reverse this case on the grounds that the instructions were erroneous. See *Coyner v. Lynde*, 10 Ind., page 283.

The plaintiffs have assigned for cross-error, that the Court erred in granting defendant an appeal from the judgment of the Justice of the Peace.

Defendant filed his affidavit, stating that the constable's return to the summons shows that it was served by the constable a copy at his last usual place of residence, that defendant never got said copy, never heard of such copy, and as stated in this return, and he never heard of the institution of the suit until the expiration of thirty days after the rendition of the judgment.

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to the toll gate, and drove around the gate for the purpose of defrauding the plaintiff of her toll. If such was the case, the verdict is supported by the law, and the jury having so found, we can not disturb the verdict.

In addition to this, an appeal can not be taken from a Special to a General Term of this Court, except in cases where an appeal will lie from the Circuit Court to the Supreme Court. Acts 1871, p. 53, Sec. 25. The provisions of Sec. 550, p. 269, 2 G. & H., will not permit an appeal from the Circuit Court to the Supreme Court in this case, the judgment, exclusive of costs, being less than ten dollars. Hence the appeal will not lie.

The appeal is therefore dismissed at appellant's cost.

IN GENERAL TERM, 1872.

JAMES R. ELLIOTT ET AL V. HENRY BOEDECKER, Appellant.

Appeal from BLAIR, Judge.

VERDICT—*when will not be disturbed—*

INSTRUCTIONS—*when presumed correct.*

When the evidence is not in the record, the verdict of the jury will not be disturbed, and the instructions given to the jury will, in the absence of the evidence, be presumed to be correct.

George T. Morton, for appellant.

Lamb & McLain, for appellee.

RAND, J.—This was a suit brought by Elliott & Denny against Henry Boedecker, on an account for services ren-

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dered by them as real estate agents, and brokers, for negotiating a sale of defendant's real estate to one Pearson. The suit was instituted before a Justice of the Peace, and judgment by default against defendant. After the time of appealing from the Justice's judgment had elapsed, defendant obtained an order, at Special Term, granting him an appeal. The case, after a motion by plaintiffs to dismiss the appeal was overruled, was tried at Special Term by a jury, and a verdict in favor of the plaintiffs, and there was a judgment on the verdict over defendant's motion for a new trial, and an appeal was taken to General Term. The assignments of error are:

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The reasons assigned for a new trial are, that the verdict of the jury is not according to law—is contrary to the evidence, and is not supported by the evidence; also that the Court erred in instructing the jury.

The evidence is not in the record, and it would be difficult without it, to say that the verdict is contrary to the law, or evidence, or that it is not sustained by the evidence.

The instructions complained of, might have been applicable to the evidence given to the jury, and if so, we can not reverse this case on the grounds that the instructions were erroneous. See *Coyner v. Lynde*, 10 Ind., page 283.

The plaintiffs have assigned for cross-error, that the Court erred in granting defendant an appeal from the judgment of the Justice of the Peace.

The defendant filed his affidavit, stating that the constable's return to the summons shows that it was served by leaving a copy at his last usual place of residence, that defendant never got said copy, never heard of such copy being left as stated in this return, and he never heard of the institution of the suit until the expiration of thirty days after the rendition of the judgment.

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We think the affidavit was sufficient, and the Court at Special Term, having sustained the motion, and granted an appeal, we can not say he was not fully justified in doing so. Judgment is affirmed with costs.

IN GENERAL TERM, 1872.

MERCHANTS NATIONAL BANK v. JOSEPH B. RANDALL ET AL,
Appellants.

Appeal from BLAIR, Judge.

PROMISSORY NOTE—*relation of maker, and endorsers thereto.*

ENDORSERS—*liability of—*

MAKERS—*liability of.*

The members of a firm can not maintain a suit at law on a note against a third member, as joint obligors, because the same persons can not occupy the positions of obligor, and obligee, but they can endorse it to a third party, who can maintain such action against all the makers.

In equity, suit can be maintained by the obligees against the other obligees, in which all the equities arising on the contract can be fully adjusted between the parties.

A person may be a *joint maker*, and also *payee*, or *endorser*, and his rights, and liabilities in one capacity be different from that of the other, or in other words, responsible to the holder in each capacity, so far, that a judgment for, or against him *as endorser*, would not extinguish the liability of the other parties *as joint makers*. Hence a judgment against two members of a firm *as endorsers*, does not merge the note so that suit can not be maintained against a third member *as maker*.

Johnson & Stubbs, for appellants.

Dye & Harris, for appellee.

RAND, J.—This is a suit brought upon a promissory note executed by J. B. Randall & Co., and payable to the order of the firm of Lawyer & Hall, at the First National Bank of Shelbyville, and by Lawyer & Hall endorsed to said bank, and by it to plaintiff. The complaint contains two paragraphs.

The *first* alleges that Randall, and Clark were partners, trading under the name, and style of J. B. Randall & Co., and that Lawyer and Hall were partners, doing business under the name of Lawyer & Hall, and that J. B. Randall & Co. made the note payable to order of Lawyer & Hall, at First National Bank of Shelbyville, and endorsed by Lawyer & Hall, and that plaintiff is the holder, and owner of said note, and that it is unpaid.

The *second* paragraph alleges that the defendants, Joseph B. Randall, Levi Clark, Peter C. Lawyer, and Edward K. Hall, were partners, doing business under the name, and style of J. B. Randall & Co., and that Lawyer, and Hall were partners, doing business under the name, and style of Lawyer & Hall, and that J. B. Randall & Co. executed the note sued on to order of Lawyer & Hall, payable at the First National Bank of Shelbyville, and said note was endorsed by Lawyer & Hall to said bank, and that said bank endorsed the same without recourse to plaintiff, and that said note remains unpaid.

The note sued on is copied into each paragraph of complaint.

Randall demurred to each paragraph of complaint, which demurrers were overruled, and excepted to, and thereupon he filed an answer in seven paragraphs. Plaintiff demurred to *third* and *fourth* paragraphs, and filed motion to strike out parts of *second*, and *fifth*, and all of *seventh* paragraphs. Demurrers were sustained to *third*, and *fourth* paragraphs, and excepted to, and the motion to strike out parts of *second*, and *fifth*, and all of *seventh* paragraphs overruled,

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and excepted to. The Court, on motion, struck out *second* paragraph of complaint, which was excepted to, but the paragraph has not been made part of the record.

Issues were formed, and there was a trial, and verdict for plaintiff for amount of note. Also answers to interrogatories by the jury were returned.

Randall filed motion for judgment in his favor on the jury's answers to interrogatories, which was overruled, and excepted to. He then filed motion for new trial, which was also overruled, and excepted to. Judgment was rendered in favor of plaintiff on the verdict, and Randall appealed to General Term. The evidence is in the record. No defect has been pointed out in either paragraph of the complaint, and we find none.

It is urged that the Court erred in striking out the *second* paragraph of defendant's answer. We are of opinion that the *second* paragraph is not properly before us, but we have carefully examined it, and have arrived at the conclusion that any matter properly pleaded in it, could have been given in evidence, either under the *fifth*, or *seventh* paragraphs of the defendant's answer.

The *third*, *fourth*, and *fifth* paragraphs of the answer sets up a former recovery by the First National Bank whilst it was a holder, and owner, against Lawyer & Hall, on the note, that they were members of the firm of J. B. Randall & Co., and joint makers with Randall; that said bank knew that fact before it brought suit; that Randall was at all times within reach of the process of the Court, and was not sued, and hence the note sued on was merged by the judgment against Lawyer & Hall.

If the *third*, and *fourth* paragraphs of the answer are sufficient to bar a recovery by plaintiff, still there was no error in sustaining the demurrers to the same, because all matters pleaded in either of them could be proved under the *fifth* paragraph—in fact the record shows that the very matter

there pleaded was turned on an issue raised on the *fifth* paragraph of the answer.

On plaintiff's motion, the Court propounded the following interrogatories to the jury, which were answered as follows, to-wit:

First. Was the note sued on purchased by plaintiff of the First National Bank of Shelbyville? Answer—Yes.

Second. Had said note ever been paid at the time of its assignment to plaintiff? Ans.—No.

Third. Has said note ever been paid since said assignment; if so, when, and to whom, and by whom? Ans.—No.

Fourth. Was not the suit of the First National Bank of Shelbyville brought against Lawyer & Hall, upon their endorsement of said note, by their firm name of Lawyer & Hall, and not as joint makers of said note, or members of the firm of J. B. Randall & Co.? Ans.—Yes; as endorsers.

On defendants' motion, the Court propounded the following interrogatories to the jury, which were answered as follows, to-wit:

First. At the time the note in question was made, and endorsed to the First National Bank of Shelbyville, were the defendants, Randall, Lawyer, and Hall partners, doing business in the name of J. B. Randall & Co.? Ans.—Yes.

Second. Was the First National Bank of Shelbyville notified that Randall, Lawyer, and Hall were partners, and trading under the firm name of J. B. Randall & Co., at the time said note was made, and endorsed to the said First National Bank? Ans.—Yes.

Third. After the note in question fell due, did the First National Bank of Shelbyville bring suit thereon, and recover judgment on the same against Lawyer & Hall alone, and does said judgment still remain of record in full force? Ans.—Yes.

Fourth. Did the plaintiff purchase said note after the same had been sued on, and after judgment had been

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obtained on the same against Lawyer & Hall, and did the plaintiff take such assignment of said note, and judgment, with full knowledge that such judgment had been already rendered on the said note? Ans.—Yes.

The Court submitted the following interrogatory to the jury:

Fifth. Was the judgment referred to in the *third* and *fourth* interrogatories against Lawyer & Hall as makers, or against them as endorsers? Ans.—Endorsers.

It is unjustly insisted by counsel for Randall that his motion for judgment in his favor on the answers to the foregoing interrogatories should have been sustained.

This motion is based upon the fact that the jury in their answer to interrogatories found that there had been a former recovery on the note against Lawyer & Hall *as endorsers*. It is urged that the jury had no right to determine whether the suit was against them *as endorsers*, but the Court should determine that question from *the record*. That record is made part of this by the bill of exceptions, and if it was improper to submit the question to the jury, still, as we have the record before us, we are of opinion that that suit was against Lawyer & Hall *as endorsers*—indeed, the complaint expressly declares against them *as endorsers*.

It has been held in this State, in the case of *Archer v. Heiman et al*, 21 Ind., 29, also in *Root v. Thomas*, and two other cases at the present term of the Supreme Court, that a judgment against a part of the obligors to a *joint contract*, merged it as to the obligors not sued. The same rule prevailed at common law.

But this is a technical rule, and in our opinion should not be extended, or enlarged.

Does this rule apply to the case at bar?

It appears from the record that the firm of J. B. Randall & Co., was composed of Randall, Lawyer, and Hall; that J. B. Randall & Co. made the note in suit to the order of the

firm of Lawyer & Hall, and that said firm endorsed it to the First National Bank of Shelbyville, which bank was at the time aware of the relations the makers, and endorsers have to each other. Said bank afterward sued Lawyer & Hall *as endorsers*, and received a judgment against them as such endorsers. Afterward, for a valuable consideration, said bank assigned said note to plaintiff, who instituted this suit against Randall, Lawyer, and Hall as makers.

The weight of authority seems to be that Lawyer & Hall could not maintain a suit at law on the note against Randall as maker, because the same persons can not occupy the positions of both obligor, and obligee; but they could endorse it to a third party, who can maintain such action against all the makers. See 11 Metcalf, Mass., 398; 17 Pickering, 361; 18 Ohio, 305; 5 Cowen, 688.

The rule seems to be different in equity. A suit in equity can be maintained by the obligees against the other obligees, in which all the equities arising on the contract can be fully adjusted between the parties. See 1 Story Equity, Section 680.

We see no reason why a person may not be a joint maker, and also payee, or endorser, and his rights and liabilities in one capacity be different from that of the other; or in other words be responsible to the holder in each capacity, at least so far that a judgment *for, or against* him as endorser would not extinguish the liability of other parties as joint makers.

We have come to the conclusion that the rule of merger, above referred to, does not apply to this case; that the judgment in favor of the bank against Lawyer & Hall *as endorsers* does not merge the note so that suit can not be maintained against Randall *as maker*.

If what we have said is correct, it follows that the Court did not err in giving instructions to the jury, or refusing the one asked by defendants.

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No other objections have been pointed out to us by counsel, and we see no error in the record.

The judgment at Special Term is affirmed.

NOTE.—A judgment is not *per se* a satisfaction of the debt, nor will it, until satisfaction, prevent the holder from proceeding on the bill, or note against any other distinct party to it. *Smith on Mercantile Law*, 347, and *note*.

The indorsement of a bill is not merely a transfer of the paper, but a fresh, and substantive contract. It is equivalent to a new bill drawn by the indorser upon the acceptor in favor of the indorsee. As it falls under the general rule, that the obligations of a personal contract are to be determined by the law of the place of its execution, an indorser may become responsible for a much higher rate of damages, and of interest, upon the dishonor of a note, than he can recover from the drawer. 6 *Cranch*, 221; 4 *Mass.*, 258; 3 *do.*, 77; *Story on Conflict of Laws*, 6th Ed., Sec. 314 to 321, and Sec. 343, 344, 347.

It is as to all persons who become holders in whatever country, treated as a contract made by the acceptor, in the country where such acceptance is made. *Same*.

The contract of indorsement is not an independent one, but a parasite, which, like the chamelion, takes the hue of the thing with which it is connected. Attached to commercial paper, it becomes a commercial contract, operating as a contingent guaranty of payment, and a transfer of the title, where the paper is negotiable; attached to any other *chose in action*, it becomes an equitable assignment of the beneficial interest without recourse to the assignor." *Ch. J. Gibson, in Patterson v. Poindexter*, 6 *Wall. & Serg.*, 234. See also 12 *Wend.*, 439; 22 *do.*, 215; 4 *Den., N. C.*, 122.

"There is a substantial distinction between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, although depending upon different principles, have usually been confounded. * * In the first of them, the original security is extinguished, but the debt remains; in the second, the debt, as well as the security, is extinguished by the acceptance of another debt in payment of it.

Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher, and being by act of law, it is dependent on no particular intention. Extinguishment by satisfaction takes place indifferently between securities of the same degree, or of different degrees, and being by act of the parties, it is the creature of their will.

No expression of intention would control the law, which prohibits distinct securities of different degrees for the same debt, for no agreement would

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prevent an obligation from merging in a judgment on it, or passing in *rem judicatum*."

"Neither would an agreement, however explicit, prevent a promissory note from merging in a bond, given for the same debt by the same debtor, for to allow a debt to be at the same time of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation unsettle distinctions, and lead to embarrassment in the limitation of actions, and the distribution of assets. But as to the existence of a promissory note as a concurrent security for a book debt produces no such consequences, it operates no extinguishment by act of law; and it depends on the consent of parties, tacit, or explicit, whether the new evidence of the debt is accepted in discharge of the old one.

"The difference on the whole consists in this, that in case of merger, there is a change only of the security; but in a case of satisfaction by substitution, there is a change of the debt. *Ch. J. Gibson, in Jones v. Johnson, 3 Wall. & Serg., 276. See also 1 G. & H., p. 447, and notes.*

A, B, and C were partners under the firm name A & Co. B, and C were also partners under the style of B & C. The firm of A & Co. made a note payable to the order of B & C. This was not a promissory note until assignment, but when assigned by B & C, the assignee, as between himself, and the makers, must be regarded as the *real payee*, and may sue all the makers. *Murdock v. Caruthers, 21 Ala., 785; Smythe v. Strader, Perrine & Co., 9 Ala., (Porter), 446.* In this case they are all said to be makers. *Pitcher v. Barrows, 17 Pick., 361; Lacy v. L'Bruce, 6 Ala., 904; Haselhurst v. Pope, 2 Stewart & Porter, 259; Hewwood v. Wingate, 14 N. H., 73. See also Chitty on Bills, 516, 553; 2 B. Comm., 467; Story on Prom. Notes, 4; Smith et al v. Lurkee et al, 5 Cowen, 688, 708.*

The Court below—supported by the following authorities, *Dillon v. State Bank, 6 Blackf., 5; Goodlot v. Britton, 6 do., 500; Lodge v. State Bank, 6 do., 557; Marshall v. Pyeatt, 13 Ind., 255*—gave the following instruction in this case, upon which hinged the right of recovery against the maker of the note, and which was sustained in General Term:

"If you find from the evidence that, after the First National Bank of Shelbyville had obtained a judgment upon the note in suit against Lawyer & Hall as indorsers of the note, and for a valuable consideration assigned said judgment, and note to the plaintiff, the plaintiff, in other words, purchasing the said assignment, this assignment would carry with it all remedies, or right of action which the First National Bank of Shelbyville had against any other parties to the note, and in such case, if you find that the note was made by the firm of J. B. Randall & Co., payable to Lawyer & Hall, who were members of the firm of J. B. Randall & Co., and hence with the defendant Randall, were joint makers of the note, if they also under the firm name, and style of Lawyer & Hall indorsed the note to the First National Bank of Shelbyville, they by such indorse-

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"ment assumed another, and separate obligation distinct from that of
 "makers, and they could be sued upon the obligation thus assumed as
 "indorsers, and a recovery against them in such a suit could not be a bar to
 "the prosecution of another suit against the defendant Randall, and them-
 "selves as makers of the note, and in such case the plaintiff will be entitled
 "to recover against defendant Randall."—[REPORTER.

IN GENERAL TERM, 1872.

STATE OF INDIANA *ex rel* BAYLESS W. HANNA, Attorney
 General, v. NATHAN KIMBALL *et al*.

Appeal from NEWCOMB, Judge.

TREASURER OF STATE—*liability of*—
 BOND OF—*how far liable on*—
 SURETIES ON—*Bond of, how far liable.*

The act to provide a treasury system for the State of Indiana,* and the act of 1861, entitled "an act defining certain felonies, and misdemeanors, and prescribing punishment therefor, and providing for certain evidence on the part of the State,"† must be construed in *pari materia*.

The purpose of these acts is to compel the keeping of the money of the State in the safes, and vaults provided for in the first cited act, and to prohibit the use of the funds in the hands of the Treasurer by investing, loaning, or depositing the same.

The last clause of the *fit* section of the act of 1859,‡ which requires that all interest, or bonus received by the Treasurer of State, arising out of any money of the State, shall by him be fully accounted for, is not a penalty prescribed for the violation of law.

The penalties prescribed by the act of 1861,§ for all violations of the provi-

*1 G. & H., 645.

†2 G. & H., 456.

‡1 G. & H., 645.

§3 G. & H., 456.

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sions of the act of 1858, show an intention on the part of the Legislature to abandon the remedy provided by the last clause of the *fifth* section of the act of 1859, and said clause of said act is no longer operative, the legislation of 1861 being inconsistent therewith.

Where all the funds, which by law are properly in the hands of the Treasurer of State, have been fully accounted for, and paid over, neither he, nor his sureties are liable on his official bond as Treasurer, for other funds acquired by the doing of acts in violation of law, and which acts constitute a crime, or misdemeanor.

Bayless W. Hanna, Attorney General, *Solomon Claypool*, *Napoleon B. Taylor*, *W. R. Harrison*, for the State.

Gordon, Brown, & Lamb, *Hanna & Knefler*, for defendant.

BLAIR, J.—This is a suit against the defendant Kimball and his sureties, upon the official bond given by Kimball as Treasurer of State.

At Special Term three breaches of the bond were assigned, but subsequently all were dismissed by the plaintiff but the first, which is, that the defendant did not honestly and faithfully discharge his duties as Treasurer of State, nor did he pay, account for, and deliver to the plaintiff, or his successor in office, or other person authorized to receive the same, all the moneys, securities, and assets belonging to the plaintiff, but that during his term of office he, as such Treasurer of State, received, and had under his control a large amount of money belonging to the plaintiff, which he used on his own account, and in his private business, loaned to divers persons at interest, and deposited in banks of deposit at interest, and by reason of such use, loans, and deposits he made, and received interest, profits, and income thereon to a large amount, and which he has failed to account for, or pay over to his successor, but has converted the same to his own use.

Separate, and joint demurrers were filed by the defendants to this assignment of breach. These demurrers were sustained on the ground that the assignment did not state facts sufficient to constitute a cause of action.

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Judgment was then rendered on the demurrer at Special Term, in favor of the defendants, and an appeal was then taken by the plaintiff to General Term.

The question presented by the assignment of error is the action of the Court at Special Term on the demurrer.

The State, in the breach of the bond set out in the complaint, seeks to recover of the defendants, interest, profits, and income alleged to have been received by the defendant Kimball from the use of money of the plaintiff in his private business, and from loans, and deposits of money of the State.

It is not charged that there has been any failure to pay over, or account for the principal of moneys that came to his hands as Treasurer.

An examination of the statutes relating to the duties, and obligations of the Treasurer of State is necessary in the consideration of the question presented by this demurrer. In 1859 an act was passed to provide a treasury system for the State of Indiana. 1 G. & H., p. 645. Without citing the act in full, it will be necessary to notice the following provisions contained therein:

Section one provides that the room occupied by the Treasurer of State, together with the safes, vaults, etc., "shall constitute the treasury of the State of Indiana," and the Treasurer is required to use the same "as the sole place for the deposit, and safe keeping of the moneys of the State, etc."

The third section specifies what moneys shall be paid into the State treasury.

Section four requires the execution of a bond by the Treasurer, and sets out the conditions it shall contain.

Section five prohibits the Treasurer from *loaning, using, or depositing* in any bank, or with any person, any of the moneys of the State, and says the same shall be safely kept until directed to be paid out, or transferred by law, and the Treasurer is "expressly prohibited from receiving, in any

manner, for his own use, any interest, premium, gratuity, bonus, or benefit whatever by the disposition of, or arising out of any money, or property belonging to the State, or to any county, or any fund of the State, or county, or of any loan obtained for the State, or for any county, *but whatever is so received shall by him be fully accounted for.*

The sixth section requires every person making payment into the treasury to first furnish the Auditor of State with a description of the liability on account of which payment is to be made, this is to be certified to the Treasurer, and the Auditor must also "make his draft in favor of the Treasurer upon the person making the payment, and the certificate, and draft must then be presented to the Treasurer, and he shall receive the money; and the Treasurer is expressly prohibited from receiving any money into the treasury except it be thus paid upon draft."

Section seven expressly prohibits the Treasurer "from paying any money out of, or transferring any money from the treasury of the State, except upon the warrant of the Auditor of State," etc.

This act prescribed no penalties for the violation of any of its provisions. It prescribes certain things that shall be done, and the manner of doing them, and prohibits in express terms the doing of certain other things, and among them the receiving by the Treasurer of any interest, or bonus, or benefit by the disposition of any money belonging to the State, but says that "whatever is so received shall by him be fully accounted for."

It is evident from the express provisions of this statute, that it was the intention of the Legislature that the money in the treasury of the State should be kept at all times in the safes, and vaults provided for that purpose. The act was passed for the purpose of preventing the money from being removed for any purpose except upon the warrant of the Auditor of State, drawn in pursuance of law. It is evident

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that the Legislature was looking to, and legislating to secure the safe keeping of the monies of the State, and intended that no license should be given for the removal of the money, and its deposit in bank, for the reason that it might endanger the safe keeping of the fund. The State does not levy taxes, and cause them to be paid into the treasury for the purpose of being loaned, or deposited for purposes of accumulation, but to be applied to the payment of the current expenses of the government, and to discharge the obligations of the State. It is not expected that large sums of money will accumulate, and lie in the hands of the Treasurer, or be loaned, or deposited by him, and the statute says expressly that the Treasurer shall not so use the money, nor receive any interest, or bonus for his own use, by the disposition made of, or arising out of any money of the State.

To add this provision: that "whatever is so received shall by him be fully accounted for," is an anomaly in legislation.

It is very unusual for a State to prohibit the doing of an act, and at the same time provide that if the act is done, and a profit made, interest, or bonus received, it must be fully accounted for, and paid over.

This paying over and accounting for is not provided as a penalty for the violation of the law, but so far as the act under consideration specifies, it simply proposes to the Treasurer that if he should remove the money from the vaults, and loan, or deposit it, and receive therefor any interest, the violation of law will be forgiven if he shall fully account for the amount received.

However unusual this kind of legislation may be, it is perhaps competent for the Legislature to so enact, and if this legislation stood alone, though the mode of the accounting, or authority to call upon him to account is not in any manner defined, nor any remedy specified if there is a failure to account; courts might find a remedy, and enforce it, by

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sustaining a suit upon his official bond, or otherwise. But at the next session of the Legislature, in 1861, another act was passed entitled "an act defining certain felonies, and misdemeanors, and prescribing punishment therefor, and providing for certain evidence on the part of the State. 2 G. & H., 456.

The first section of this act says, that if any officer entrusted with money of the State shall use the same by way of investment, or shall loan, or deposit the same, "he shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the State prison, not less than one, nor more than twenty-one years, and be fined not exceeding double the value of the money, etc."

By the third section it is made a misdemeanor for the Treasurer to *receive, or pay out* any public money in any other manner than as prescribed by law, and on conviction thereof he "shall be fined not less than fifty, nor more than five hundred dollars, and be imprisoned in the county prison not less than one year."

Section five provides that if the Treasurer of State shall receive any fee, bonus, or perquisite of any kind, on account of any public money, and shall fail, or neglect to report, and pay the same into the treasury, in the manner, and at the time required by law, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum equal to double the value of the amount so received, and be imprisoned in the county jail not less than one month, nor more than one year.

These acts being expressions of the legislative will upon the same subject, must be construed in *pari materia*. It is evident that the general intention, and purpose of the last act is the same as that of the first, that is, to compel the keeping of the money in the safes, and vaults provided for in the first recited act, and prohibit the use of the funds of the State in the hands of the Treasurer by investing, loaning,

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or depositing the same. The act just cited is highly penal in its character.

The Treasurer is in the first place expressly prohibited from removing the monies from the treasury to use, loan, or deposit the same. In the second place, it is equally unlawful for him to receive any interest, or bonus, for the use, loan, or deposit of the monies. To do the first act is a felony; to receive any interest, or bonus is a misdemeanor.

Suppose we give force, and effect to every portion of these acts, by holding that the interest sued for can be recovered in this suit upon the official bond of the Treasurer by reason of the provision that requires the Treasurer to account for "whatever is so received." The State would in such case recover the amount of interest of the Treasurer in a civil suit, *by virtue of the contract contained and entered into by the Treasurer and his sureties*, in the execution by them of the bond.

In addition to this the Treasurer might be convicted of a felony for using, loaning, or depositing the money, and imprisoned in the State prison for not less than one, nor more than twenty-one years.

Again, he might still further be convicted of a misdemeanor for receiving the interest, and failing to account for it, and on conviction the law says he "shall be fined in a sum equal to double the value of the amount so received, and be imprisoned in the county jail not less than one month, nor more than one year."

The act of 1861 is the last expression of the Legislature, and there is no question as to the validity of its provisions. Does it repeal any of the provisions of the former act, and especially that portion requiring interest illegally received to be accounted for? Is the last clause of the fifth section of the act of 1859 in force, so as to give the State a right of action in a civil suit against the Treasurer, and his sureties on the bond?

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Now it is, perhaps, competent for the Legislature, by express statute, to authorize the taking of an obligation, bond, or contract from her officer that he will not do an illegal act that is a felony, and that he will not do another additional act with reference to the same matter that is a misdemeanor, and at the same time contract that if these acts are done, the State shall receive all the profits that may be acquired by the illegal and criminal acts, and give a remedy to recover those profits if they are not voluntarily paid over.

Courts would be slow, however, to imply such an intention on the part of the Legislature, from any doubtful, or vague expressions of a statute; for it is an old, well established, and wholesome rule of law, founded on general principles of public policy, that no court will lend its aid to a man whose cause of action is founded upon an illegal or immoral act.

If A lets B have a thousand dollars under an agreement that B shall not wager the same in any game of chance, and a further agreement that if he does so wager it, and win, the profits resulting therefrom shall be paid to A, a court will not permit A to come in, and invoke its aid to assist him in recovering the profits of B.

It is possible, as before indicated, that the State, by her Legislature, may set a bad example—one at variance with all previous rules of public policy—by reserving to herself a right of action to recover the proceeds of an illegal act, not as a penalty for a violation of her laws, but because she has so stipulated in the contract or bond.

But to so hold, there must be no doubt as to the legislative intention, and the same should be clearly, and definitely expressed. So far from the statutes clearly indicating such intention, there is much that leads us to an opposite conclusion.

The act of 1859 was mild in its character. It prohibited

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in express terms the doing of certain things, but gave no sanction to the prohibitions by providing penalties. It then provided that interest acquired by violations of the law should be fully accounted for. This was not by that act intended to be imposed as a penalty for the violation of law, but seems to indicate that if interest is so received the State shall have a right to call upon him, and compel an accounting, settlement, and paying over of the interest illegally acquired. This would involve a waiver on the part of the State of the wrong done in violating the law, and an adoption of the illegal acts of the Treasurer, by which the interest was acquired, and an acceptance of the money in satisfaction of the wrong, and of the contract of the Treasurer to account for the same.

While for the purpose of carrying out the intention of the Legislature in protecting the treasury, the above construction might properly have been given to the section cited in the act of 1859 when standing alone; the adoption of the act of 1861 seems to clearly indicate an intention on the part of the Legislature to abandon the remedy which was given, or allowed by the act of 1859; and without proposing to rely on the contract, obligation, or duty to account for the interest illegally acquired, substituted penalties to be inflicted, or incurred, not only when the first step towards acquiring the interest was taken, but additional ones to be applied when the second step should be taken—that of receiving the interest.

We are strengthened in this conclusion by the fact that one of the penalties in the act of 1861 is measured by the amount of interest received, and the fine can not be less than double the amount received.

Is it reasonable to conclude that the Legislature in 1861 intended that the State should have a right of action in a civil suit against the Treasurer, and his sureties on their bond to recover interest which he was prohibited from

acquiring, and in addition that he might be convicted of a felony, and imprisoned in the State prison for loaning, or depositing the money by which the interest was acquired, and also that he might be convicted of a misdemeanor for receiving the interest, and not accounting for it, and imprisoned, and fined, as before stated, in a sum not less than double the amount received?

This would be an accumulation of remedies, the parallel of which can not be found in our statutes, and is not warranted by the spirit of any code not based on the "principles of vindictive justice," and we can not suppose that the Legislature had such intention.

In arriving at these conclusions, we are not letting down the barrier, and opening the door for fraud, and speculation. If the money in the treasury is not fully accounted for, the Treasurer, and his sureties are clearly liable for it. If removed from the vaults to loan, or deposit, the 12th, and 13th Sections of the act of 1859 give a summary, and efficient remedy, in addition to a suit upon the bond if the money is not accounted for.

Again, the provisions of the penal act of 1861 being valid, an enforcement of its provisions would be more efficacious than for the State to say to the Treasurer you must not loan, or deposit the money in your hands, but if you do loan it, I will agree to receive the interest of you, and you, and your sureties must agree in your bond to pay it to me. After making such agreement, it would be bad faith on the part of the State to turn around, and enforce the provisions of the penal act of 1861, and punish the Treasurer for the acts by which the interest was made, which, if the position of the plaintiff is correct, she had before contracted, by taking the bond of the defendants, to receive.

By accepting the office, and entering upon the duties of the same, the Treasurer assumes all the obligations incident to a faithful, and honest discharge of those duties,

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and the object to be attained by the execution of the official bond is, that the State may have the undertaking of others as sureties for the Treasurer, and while the sureties in such case are liable upon the bond in all cases where the principal is clearly liable, they are nevertheless sureties, and ought not to have their obligations extended by doubtful construction beyond the terms of the law, and the bond, or contract which they have entered into. It is not necessary to cite authorities in support of this well recognized rule of law. When all the funds, which by the terms of the law are properly in the hands of the Treasurer, have been fully accounted for, and paid over, to hold the parties liable for other funds that have been acquired in violation of law, and in acquiring which the Treasurer may be prosecuted in criminal actions, is extending the terms of the bond beyond anything that the parties could reasonably be held to contemplate at the time of its execution.

For these, and other reasons given by Judges Newcomb and Rand, a majority of the Court is of opinion that the latter clause of the fifty-second Section of the act of 1859 is no longer operative, the legislation of 1861 being inconsistent therewith, and that the action of the Court at Special Term should be affirmed.

We all concur in the ruling of the Court at Special Term, that the Attorney General had authority to institute the suit as stated in the opinion of Judge Rand.

Judgment affirmed.

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Held : That the State can not maintain a civil suit against an ex-Treasurer of State for interest charged to have been realized by him from loans of State funds, so long as she makes the requirement that he shall not pay such interest into the treasury in any other way than by accusing himself of the commission of an offense against the criminal code, and placing on record evidence to be used against him in case the State should resort to a prosecution for such offense—*per Newcomb, J.*
Statutes of 1859, and 1861, and Sec. 14, Article 1, Constitution of Indiana, construed.

NEWCOMB, J.—I concur in opinion with my brother Judges that the Attorney General had authority to institute this suit in the name of the State, and I agree with Judge Blair that the judgment at Special Term should be affirmed.

My conclusion in favor of affirmance is based more particularly on the sixth section of the Treasury Act of 1859, 1 G. & H., 647, and Section 14, of Article 1, of the Constitution of Indiana.

Section 6, of the Treasury Act, is as follows :

“ Every person making payments into the treasury of State, shall furnish to the Auditor of State *a description of the liability on account of which such payment is to be made*, and the Auditor of State, after careful examination of such documents, or accounts, as the case may require, shall certify to the Treasurer of State the amount to be paid, and the fund to which it is to be paid, and shall make his draft in favor of the Treasurer upon the person making the payment, which certificate and draft shall then be presented by such person to the Treasurer of State, who shall receive such money ; number, register, file, and preserve such draft, and certificate, and shall give a receipt for the amount paid, specifying the liability on account of which it is paid ; *and the Treasurer of State is expressly prohibited from receiving any money whatever into the State treasury, or on account of any fund thereof, except it be paid upon drafts as herein provided.*”

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By the statute of 1861, cited in the other opinions delivered in this case, it is made a criminal offense in the Treasurer of State to loan, or deposit money belonging to the State treasury; yet if he does so loan, or deposit the same, he can not possibly pay into the treasury any interest received thereon, without furnishing evidence against himself in a criminal prosecution. He must first report to the Auditor the fact that he has violated the law, and state the amount of profit realized thereby; then on his report the Auditor is required to issue a certificate, and draft, both necessarily reciting the fact that the Treasurer has made unlawful gains on the State's money, and both these documents the offending Treasurer is required to *register, file, and preserve* in his office, as permanent record evidence against himself, or, if he has ceased to be such officer, then his successor is in like manner to register, file, and preserve them.

This is the only mode by which the unlawful interest can find its way to the State treasury, for the statute expressly prohibits its payment in any other manner.

It is for not doing this, that the present suit has been brought against Kimball, and the sureties on his official bond. Can any man, be he a public officer, or private citizen, be held liable for damages in a civil action for not doing an act, the doing of which is an accusation against himself that he has violated a criminal statute? The Constitution gives an emphatic negative answer. It says: "No person, in any criminal prosecution, shall be compelled to testify against himself."

In *Wilkins v. Malone*, 14 Ind., 154, the Supreme Court make the following observations on this clause of the Constitution: "Literally, this provision extends to criminal prosecutions only, and not to civil actions; but we think its spirit and intent go much farther, and protect a person from a compulsory disclosure in a civil suit, of facts tending to criminate the party, whenever his answer could be given in

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evidence against him in a subsequent criminal prosecution.”

In *Ford v. The State*, 29 Ind., 542, it was held that a witness not only was not bound to give testimony which would tend to show him guilty of a crime, but that he was not bound to disclose a single link in the chain of evidence which would convict him.

If a witness, called to testify in a court of justice, may not be required to answer a question, the answer to which may by possibility be used against him in a subsequent criminal prosecution, it is equally true, in my judgment, that no man can be required to furnish evidence out of court that might be used against him in a subsequent criminal prosecution.

In opposition to this view of the case in hand, it has been urged that the same reasoning would absolve the Treasurer from returning money illegally taken from the State treasury. The cases do not seem to me to be at all alike. All money received into the treasury, in contemplation of law, remains there until paid out in the manner authorized by the statute. The Auditor's books show that a certain amount of money is in the treasury, and if by any means a portion, or all of it has disappeared without being drawn out on proper warrants issued by the Auditor, the missing money may be replaced without making the report required by section 6, of the act of 1859. At least this could be done during the term of the officer under whose administration the money may have disappeared. After the expiration of his term of office, his successor may demand the money shown by the books of the Auditor's, and Treasurer's offices to be in his hands, and he may pay it over without thereby admitting that he has been guilty of either of the offenses specified in the first section of the act of February 22, 1861. That section provides that any *failure*, or *refusal* of such officer to pay over, or produce any such money, funds, securities, or other property when demanded by any officer, or person entitled to receive the same, or when required by law, shall be held

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prima facie evidence of the felony therein defined. The necessary sequence of this provision is, that the payment on demand, or when required by law, is not to be considered as *prima facie* evidence, nor as any evidence, that the party so paying has violated the penal clauses of that section.

It will be seen by reference to the several sections of these statutes, that money that has once come to the Treasurer's hands, and been charged to him on the Auditor's books, may if it has been removed from the proper place of custody, be replaced, or paid over to the Treasurer's official successor without the interposition of the Auditor.

But if there should be a defalcation so long continued as to make it necessary for money paid in discharge of it to be reported to the Auditor, it does not follow that the delinquent officer in making such payment need charge himself with having become liable to a criminal prosecution. Money may disappear from the treasury, and yet the Treasurer be guilty of no crime, although liable to an action for its recovery. If by reason of the depredations of thieves, burglars, or embezzlement by an employe in his office, the Treasurer should be unable to produce, or pay over on demand, money that had come into the treasury, such failure would not make him a criminal, therefore he could subsequently pay it back by the process prescribed in the act of 1859, without accusing himself of crime. The statutes provide other methods of ascertaining the state of the treasury. They are by means of an examination to be made under the authority of the General Assembly, or either branch thereof, or by an accountant appointed by the Governor, assisted by the Secretary of State—Section 13, of the treasury act, 1 G. & H., 649; or by the failure of the Treasurer to pay over to his successor in office the amount shown by the Auditor's books to be chargeable to him—Section 6, of the embezzlement act, 2 G. & H., 457. If in either case a deficiency is found to exist, I think the Treasurer may make the loss good, even

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through the medium of a report to, and draft upon him by the Auditor of State, because he need not, in making good the loss, charge himself with having criminally abstracted the funds. It would be enough for him to say in his descriptive report to the Auditor that the money was due on account of a deficiency in the treasury, stating the particular fund, or funds in which the deficiency existed. He need not state that it had been feloniously withdrawn by him, while in the case we are now considering, the very fact of reporting to the Auditor that certain interest is due from him on loans, or deposits made from the treasury, makes him a self-accuser, and at the same time furnishes evidence ample to convict him of the felony defined by the first section of the embezzlement act.

For the foregoing reasons, if there were no others, I should feel constrained to hold that the State can not maintain a civil suit against an ex-Treasurer of State for interest charged to have been realized by him from loans of State funds, so long as she makes the requirement that he shall not pay such interest into the treasury in any other way than by accusing himself of the commission of an offense against the criminal code, and placing on record evidence to be used against him in case the State should resort to a prosecution for such offense.

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Held: That the Legislature may by joint resolution, a recognized form of expressing the Legislative will, give the Attorney General authority to act as the attorney, or person who informs, or relates to the Court the grievances of the State, and asks the Court to redress these wrongs, which it is alleged the State has sustained, and under such authority he may institute this suit. *Per Rand, J.*

Held: That there is no penal, or criminal punishment provided in the Treasury Act of 1859, for its violation; that the act of 1861 so far amended that act as to punish officers for violating that part prohibiting the *loaning, using, or depositing in bank, or with other persons*, the public funds; that such act of 1861, instead of repealing a part, and substituting others, was intended only to place around the treasury additional safeguards to prevent the use of public funds by officials. *Per Rand, J.*

Held: That the interest made by the Treasurer on the funds belonging to the treasury is the property of the State, and the failure of the Treasurer to account for and pay the same into the treasury, for the reason that his so doing would furnish evidence against him which might be used in a criminal prosecution, or for *any other reason*, does not affect the State's right to the same, and the failure to pay the same is a breach of the conditions of his bond. *Per Rand, J.*

Held: That no demand for such interest is necessary before suit—coming his hands as *Treasurer*, he is required to fully account for the same under Sec. 5, Act 1859, and failing so to do, is another breach of the bond. *Per Rand, J.*

RAND, J.—This was a suit brought in the name of the State of Indiana on the relation of Bayless W. Hanna, Attorney General, against Nathan Kimball, as principal, and the other defendants as sureties on the official bond of said Kimball as Treasurer of State.

The bond in suit is conditioned according to the requirements of the statute that Kimball “shall honestly and faithfully discharge the duties of his office, and that all persons by him intrusted with any of the concerns thereof shall act with fidelity, and that he shall render just and true accounts of the condition of the treasury of said State when required by law, and shall at the end of his term, or sooner, or at the expiration of his office, pay, and deliver to his successor, or to such person as may be otherwise authorized to receive

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them, all moneys, securities, assets, and property of every kind belonging to the treasury of said State in his hands as such Treasurer, or in the hands of any of his employees."

The only breach which we have to consider, is the allegation that he did not honestly, and faithfully discharge his duties as Treasurer of State, nor did he pay, account for, and deliver to the plaintiff, or his successor in office, or other person authorized to receive the same, all the moneys, securities, and assets belonging to the plaintiff, but that during his term of office he, as such Treasurer of State, received, and had under his control a large amount of money belonging to the plaintiff, which he used on his own account, and in his private business, loaned to divers persons at interest, and deposited in banks of deposit at interest, and by reason of such use, loans, and deposits he made, and received interest, profits, and income thereon to a large amount, and which he has failed to account for, or pay over to his successor, but has converted the same to his own use.

The Court at Special Term sustained a demurrer to the complaint, and on appeal two questions are raised by the assignment of errors:

First, Whether the State, on the relation of the Attorney General, can maintain the suit?

Second, If it can be maintained on such relation, does the complaint state facts sufficient to constitute a breach of the conditions of the bond?

The first point was so fully, and ably discussed by Judge Blair at Special Term, that I will content myself by referring to his argument, and the authorities there cited, and say that I concur with him that the suit can be maintained on the relation of the Attorney General.

He says: "It is contended that the action is not brought by any person as relator that has a right to institute the said action, or prosecute the same as such relator, the Attorney General not being authorized to institute said action as

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relator, or otherwise, and the State Auditor being the only person authorized by law to institute the same."

In support of this, it is insisted that the sixth and seventh clauses of section two, of the act defining the powers, and duties of Auditor of State, being express statutory enactments, preclude the Legislature from conferring upon the Attorney General, by a joint resolution, the authority to institute the suit. The statute referred to reads as follows:

"Section 2. He shall, * * * *Sixth*, Institute, and prosecute, in the name of the State, all proper suits for the recovery of any debts, moneys, or property of the State, or for the ascertainment of any right, or liability concerning the same. *Seventh*, Direct, and superintend the collection of all moneys due the State, and employ counsel to prosecute suits instituted at his instance on behalf of the State." 1 G. & H., p. 118.

It is undoubtedly true that a joint resolution is not a law; but how far the Legislature may control, or direct the action of officers by a joint resolution, has never been fully, and authentically determined.

As a joint resolution is not a law, it follows that a law can not be changed, or amended thereby, and hence where the powers, and duties of an officer, and the manner of executing the same, are prescribed by law, no change of these duties and powers, and their mode of exercise, inconsistent with the statute, can be made by a joint resolution.

The case of *The State ex rel Brown v. Bailey*, 16 Ind., 46, has been cited and commented upon by counsel, and a brief review of the case will aid us somewhat in the present examination. In that case the duties, and authority of the Secretary of State, with reference to the distribution of the laws, were prescribed by express statute, and these enactments required him to distribute the laws in one volume to the several counties of the State. The Constitution also provides that "No act shall take effect until the same shall

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have been published and circulated in the several counties of the State, by authority, except in case of emergency, which emergency shall be declared in the preamble, or in the body of the law." Const., Art. 4, Sec. 28.

We see from the foregoing, that the law was in perfect harmony with the Constitution, and conferred the necessary "authority" upon the Secretary of State to publish, and circulate the laws in one volume.

On the 9th of June, 1852, while the foregoing law was in force, the Legislature, by a joint resolution, directed the Secretary of State to publish, of the many laws passed at that session, a certain railroad act, and four others, and circulate them as soon as convenient. They were so published and circulated, and the court held that they took effect, and were in force long before the laws were published, and circulated, according to the provisions of the law then in force.

The Constitution required the laws to be published, and circulated "by authority." There was a law in the statutes conferring that authority, and prescribing the manner of its exercise.

The Legislature, by a joint resolution, conferred the same authority, and prescribed a mode, differing somewhat from the statute, by which it should be exercised, and the acts of the officer under it were held to be valid, and the laws circulated were held to be in force.

This was not changing the law by the joint resolution. The law remained as it was, and required the Secretary of State to comply with its provisions, by afterwards circulating all the laws in one volume. Suppose the joint resolution had conferred the authority upon the Auditor of State, or some other officer, would the ruling have been otherwise? I fail to see any reason for supposing that it would have been different.

In the case cited, the Constitution required the laws to be circulated by authority. A statute conferred that authority.

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The Court held that the Legislature by a joint resolution, differing in some immaterial matters from the statute, had also conferred the authority. This, I take it, is the force, and effect of the decision in the case cited.

The repealing of laws by implication is not favored, and if two statutes are not absolutely inconsistent with each other, and a construction can be given that will uphold each, a court will not hesitate to give such construction. Hence if other statutes were enacted giving some other officer the same power to institute suits, which is conferred upon the Auditor of State by the statute before cited, the two enactments would not necessarily conflict with each other.

It has been held by the Supreme Court in the case of *Shook et al v. The State ex rel Stevens*, 6 Ind., 113, that any officer "entrusted with the duty of protecting, and preserving the surplus revenue fund may be a relator in a suit on a bond to secure a loan from that fund; and we may have many instances where the same powers can be exercised by different officers.. The officer first instituting a suit would have precedence, and any second suit by any other officer for the same cause of action would be abated by the prior suit, and but little if any trouble would ensue from the apparent conflict of authority. The question then arises—if one officer is authorized to institute suit by law, may another have the same authority given him by joint resolution. The office of Attorney General was created by law in 1855, and the fourth section of the act is as follows:

"Such Attorney General shall prosecute, and defend all suits that may be instituted by, or against the State of Indiana, the prosecuting, or defending of which is not already provided for by law, whenever notified ten days of the pendency thereof by the Clerk of the Court in which such suits are pending, and whenever required by the Governor, or a majority of the officers of State in writing, to be

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furnished him within a reasonable time for the purposes therein contemplated." 1 G. & H., page 118.

Various officers are required by the law to execute official bonds payable to the State of Indiana. These bonds, in case of officers entrusted with moneys, are conditioned for the faithful discharge of their duties, and paying over, and accounting to the proper persons for all money that may come into their hands, etc. For a breach of the condition of these bonds, suit will be in favor of the party injured. If it is an individual that is injured by the loss of, or failure to account for his money, he must be the relator, and the suit must be in the name of the State, on his relation. 2 G. & H., p. 41, sec. 7.

If the public revenues of the State, or any of the public funds are lost, or not accounted for, the whole people of the State are interested; they are injured, and an action lies, and in such case no relator is necessary. The State of Indiana in her sovereign capacity may sue. *Fry v. The State ex rel Auditor of State*, 27 Ind., 348; *Same v. Francis*, 30 Ind., 92. Who, then, may put the machinery of our State in motion? Delay may render the remedy of no avail. What authority is necessary to be given by the State to an attorney, or attorneys to draw up a complaint, or commence the action, and prosecute it to a final determination? How shall the State act? The powers of the State government are vested in three departments—the Legislative, the Executive, including the Administrative, and the Judicial. Legislative enactments have given the State of Indiana a right of action. Courts have been organized by law, constituting the Judicial Department of the State government, and the Courts are open to try that right of action.

The Legislature has by a law given the Auditor of State a right to commence the action.

The same Legislature has also said, by a joint resolution, a recognized form of expressing the Legislative will, "that

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the Attorney General of the State, with the advice and consent of the Governor, be, and he is hereby directed, and authorized to examine into, and collect, by suit, or otherwise, all claims, debts, and choses in action now due, and owing to the State of Indiana," etc. Acts of 1871, p. 70.

The right which is by law vested in the Auditor of State to bring the action, is not a right coupled with an interest, so as to give him a vested right to the exclusion of any power to vest the same right in another. The joint resolution simply gives the Attorney General authority to act as the attorney or person who informs, or relates to the Court the grievances of the State, and asks the Court to redress these wrongs which, it is alleged, the State has sustained.

The case of ——— is in many respects similar to the one before the Court, and will be found to support the views here taken.

The joint resolution changes no law, suspends, or repeals no law, does not profess to create any new cause of action, or new device in the enforcement of a remedy; and taken in connection with the sections heretofore cited from the act creating the office of Attorney General, I believe it confers on him the necessary authority to institute the suits.

The second point made, that the breach assigned does not state facts sufficient to constitute a breach of the condition of the bond, is attended with more difficulty.

From the statement heretofore made, it will be seen that the State seeks to recover of the defendants interest, profits, and income received by the defendant Kimball from the use of money of the plaintiff in his private business. and from loans, and deposits of the money of the State, and which he failed to account for, and pay over. It is not charged that there has been any failure on his part to account for, and pay over any portion of the principal of moneys that come to his hands as Treasurer of State.

An examination of the statutes relating to the duties, and

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obligations of the Treasurer of State is necessary in the consideration of the question presented by this demurrer. In 1859 an act was passed to provide a treasury system for the State of Indiana—1 G. & H., p. 645. Without citing the act in full, it will be necessary to notice the following provisions contained therein :

Section one provides that the room occupied by the Treasurer of State, together with the safes, vaults, etc., “ shall constitute the treasury of the State of Indiana,” and the Treasurer is required to use the same as the sole place for the deposit, and safe keeping of the moneys of the State,” etc.

The third section specifies what moneys shall be paid into the State treasury.

Section four requires the execution of a bond by the Treasurer, and sets out the conditions it shall contain.

Section five prohibits the Treasurer from *loaning, using*, or depositing in any bank, or with any person any of the moneys of the State, and says the same shall be safely kept until directed to be paid out, or transferred by law, and the Treasurer is “ expressly prohibited from receiving in any manner, for his own use any interest, premium, gratuity, bonus, or benefit whatever, by the disposition of, or arising out of any money, or property belonging to the State, or to any county, or to any fund of the State, or county, or of any loan obtained for the State, or for any county ; *but whatever is so received shall by him be fully accounted for.*”

The sixth section requires every person making payments into the treasury to first furnish the Auditor of State with a description of the liability on account of which payment is to be made ; this is to be certified to the Treasurer, and the Auditor must also “ make his draft in favor of the Treasurer upon the person making the payment, and the certificate, and draft must then be presented to the Treasurer, and he shall receive the money ; and the Treasurer is expressly pro-

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hibited from receiving any money into the treasury except it be thus paid upon draft.

Section seven expressly prohibits the Treasurer "from paying any money out of, or transferring any money from the treasury of the State, except upon the warrant of the Auditor of State," etc.

The act of 1859, it will be seen, not only creates a treasury room with safes, and vaults, but requires the Treasurer of State to keep the money belonging to the treasury there, and forbids his *loaning, using,* or depositing it in bank, or with any person. If, however, the Treasurer does violate these provisions of the act, it prohibits his profiting from such violation, by further providing that if he does—" *whatever is so received shall by him be fully accounted for.*"

This undoubtedly means that whatever profits he makes shall belong to the State, and be by him paid into the treasury; and there are two reasons why he should be required to do so, to-wit:

First, Because the money upon which he has made profit belongs to the State, and the increase ought to follow the principal. This is what may be termed natural equity. The Treasurer is the mere agent of the State, and we know of no case where the agent is entitled to the interest, or gains on the capital of his principal, unless by express stipulations.

Second, But the Legislature, by the clause requiring the Treasurer to account for what he received, had a further object in view; and that was the safety of the funds in the Treasurer's hands. If he had to account for all he received, the Legislature undoubtedly thought a strong motive for violating the law would be removed, as the temptation of *personal gain* would be wanting.

There is no penal, or criminal punishment provided in the act for its violation.

The requiring the Treasurer to account for what profits he has received on the money belonging to the State is in no

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sense a penalty, for the plain reason that what he so received was not his—either in equity, or by the terms of the statute.

As the object of the treasury act was to provide for the safe keeping, and disbursing the public moneys, it may reasonably be concluded that the Legislature thought that the provisions of that act would accomplish that end.

But the next Legislature, in 1861, enacted a law to criminally punish officers violating that part of the act of 1859 prohibiting the *loaning, using, or depositing in bank, or with other persons*, the public funds.

The first section says that if any officer intrusted with money of the State, shall use the same by way of investment, or shall loan, or deposit the same, “he shall be deemed guilty of felony, and upon conviction thereof shall be imprisoned in the State prison not less than one, or more than twenty-one years, and be fined not exceeding double the value of the money, etc.”

By the third section it is made a misdemeanor for the Treasurer to receive, or pay out any public money in any other manner than is prescribed by law, and on conviction thereof he “shall be fined not less than fifty, nor more than five hundred dollars, and be imprisoned in the county prison not less than one year.

Section five provides that if the Treasurer of State shall receive any fee, bonus, or perquisite of any kind, on account of any public money, and shall fail, or neglect to report, and pay the same into the Treasury, in the manner, and at the time required by law, he shall be deemed guilty of a misdemeanor, “and upon conviction thereof, shall be fined in a sum equal to double the value of the amount so received, and be imprisoned in the county jail not less than one month, nor more than one year.”

It is easy to gather from these provisions of these statutes that it was the intention of the Legislature to insure the safe keeping of the money of the State in the hands of her offi-



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cers, by surrounding their duties, and obligations with express enactments to prevent the use of public funds for private gain, thereby exposing the funds to loss by improvident speculation. In placing a construction upon these statutes, we must, if possible, carry out this intention.

I shall now consider whether the two laws can stand together, or does the latter repeal any part of the former by implication, for there is no express repeal.

Counsel have urged with great zeal, and ability that that clause of the fifth section of the act of 1859, which provides that "whatever is so received shall by him be fully accounted for," is by implication repealed by the provisions of the act of 1861, which says "that if any officer intrusted with money of the State shall use the same by way of investment, or shall loan, or deposit the same, he shall be deemed guilty of felony, and upon conviction shall be imprisoned in the State prison not less than one year, nor more than twenty-one years, and be fined not exceeding double the value of the money."

I conclude the Legislature of 1861 thought the act of 1859 did not throw sufficient safe guards around the treasury, and hence the passage of the act of that year.

Counsel for the State concede the rule to be, that when an act is *penally, or criminally punished*, that a subsequent statute inflicting other, and different punishments for the same offence, repeals the former penalty by implication.

I have already said that there was no penal punishment in the law of 1859, and if I am correct in this, then the rule above stated has no application to this case. Neither do we find any inconsistency, or conflict in a law that requires a party receiving funds not his own, to account for the same, and also criminally punishing him for receiving them. Many provisions of our criminal law not only punish criminally the felonious *appropriator* of another's goods, but in law he is also bound to restore the goods taken, with any increase

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thereof in his hands, or damages for the detention thereof. The repeal of statutes by implication is not favored by the courts, and they will so hold only in cases where the conflict is such that the one, or the other must give way, or the intention of the law making power is apparent that such repeal was intended. *Spencer v. State*, 5 Ind., 41; *Blain v. Bailey*, 25 Ind., 165; *Dwarris on Statutes*, 154; *Brown v. Lewis*, 5 Hill, 221; *State ex rel Attorney General v. McCarty*, at present term of this Court.

I regard the act of 1861 as attempting to throw additional safeguards around the treasury, instead of attempting to repeal a part and substituting others. As I have already indicated, I see no reason why the provisions of each act may not remain in full force. Indeed, the fifth section of the act of 1861 expressly requires the Treasurer, if he has received any fee, bonus, gratuity, or perquisites of any kind, to pay the same into the treasury of State, and on failure to do so, inflicts both fine and imprisonment.

But it is further urged that inasmuch as the room occupied by the Treasurer, with its safes, and vaults, is made the treasury of the State, and the *sole place* for keeping moneys belonging to the State, and inasmuch also as the Treasurer can only receive moneys into the treasury as prescribed in the sixth section of the act of 1859, that if the Treasurer should pay into the treasury any interest, or gains he may have made on use, or loan of the public funds, he would by so doing furnish evidence against himself for a criminal prosecution, and no man is bound to criminate himself.

I concede that no man is bound to, or can he be required to criminate himself.

This is not a suit for a mandate to compel Kimball to furnish a statement to the Auditor of the amount of interest, or profit he has received on the State's funds, and then to pay it into the treasury. It is now a question whether the State can obtain a judgment against him for the amount he

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he has so received, and failed to pay in. It is said that the suit can not be maintained because he could not account for it, and pay it into the treasury without furnishing evidence which could be used against him in a criminal prosecution, and it would be unjust to require him to answer in a suit when he could not voluntarily pay, and relieve himself. If there is any hardship in this position, Kimball has voluntarily placed himself in it. I may here remark that every violator of the statute against larceny places himself in the same condition. The property he thus takes belongs to the owner, and it is the legal duty of the party to restore it, but we know of no law that would compel him voluntarily to do so. Nevertheless it will hardly be contended that the true owner could not maintain a suit for its recovery.

The record in this case, if a judgment should be rendered against the defendants, could not be used against Kimball in a criminal prosecution.

The same argument would prevent the Treasurer from restoring to the treasury the principal he may have improperly taken from the vaults of the treasury, and had not restored before his successor had taken possession of the office. He could not return it by any mode known to the law, without furnishing evidence against himself in a criminal prosecution.

If I am right that the last clause of section five, of the act of 1859, *which requires the Treasurer to account for all the interest, or gains he may make on funds of the State belonging to the treasury*, is not repealed, then it follows that such interest, or gains belongs to the State, and it does not follow, because a *voluntary* payment of the same into the treasury would furnish evidence which might be used against Kimball in a criminal prosecution, that the title of the State, to the interest, or gains made on its own money is forfeited and the right transferred to Kimball.

I am, therefore, of opinion that the last clause of the fifth

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section, of the act of 1859, is not repealed, but is in full force; that the interest that the Treasurer has made on the funds belonging to the treasury is the property of the State, and the failure of the Treasurer to account for, and pay the same into the treasury for the reason that his so doing would furnish evidence against him which might be used in a criminal prosecution, or *for any other reason*, does not affect the State's right to the same, and the failure to pay the same is a breach of the conditions of his bond.

It is said a demand was necessary before a suit was instituted. If I am right that the interest, or gains sued for is the State's, it should have been placed in the treasury by Kimball. If he could not comply with a demand to account without furnishing evidence against himself in a criminal prosecution, then it would be an idle ceremony to make it.

If he had failed to restore the principal which he had illegally taken from the treasury, would it be contended that a demand was necessary? The condition of his bond is: *that he will faithfully discharge the duties of his office*, and also will, at the end of his term, or expiration of his office, pay, and deliver to his successor all moneys, securities, assets, and property of any kind belonging to the treasury of State, in his hands as Treasurer of State, or in the hands of any of his employees.

I have shown that if the Treasurer loans, or deposits the funds belonging to the treasury of State, he has not faithfully discharged the duties of his office; and I have further endeavored to show that if he does loan, or deposit such funds, and receive interest therefor, it belongs to the State, and he is bound to pay the same into the treasury, and if he fails to do so he has not faithfully discharged the duties of his office in this respect. If any interest came to his hands on account of the loan, or deposit of the funds belonging to the treasury of the State, such interest must necessarily come to his hands as Treasurer, because he is required to *fully*

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account for the same, and if he failed to pay the same over to his successor, it is a further breach of the conditions of his bond. It was his duty to have left it in the treasury, and turned it over to his successor.

In such case no demand is necessary. A suit is a sufficient demand.

For these reasons I have been constrained to differ with my brethren in the conclusion which they have come to, and think the demurrer at Special Term should have been overruled.

NOTE.—The form of "joint resolution" is generally adopted when administrative, local, or temporary laws are to be passed. 1 *House J.*, 1, 20, 816; 1, 32, 679.

This form of Legislation is recognized in most of our constitutions, in which, and in the rules, and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. See *Art. 4, Sec. 18, Cons. Indiana*.

In Congress, a joint resolution is governed by the same rules as a bill. See *Wilson's Digest Parliamentary Law*, Secs. 1138, 1139, 1140, and notes.—
[REPORTER.

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IN GENERAL TERM, 1872.

THE STATE OF INDIANA EX REL THE ATTORNEY GENERAL
v. THOMAS B. MCCARTY *et al.*

Appeal from BLAIR, Judge.

AUDITOR OF STATE—*duties of as custodian of the Sinking Fund—*

BOND OF—*liability of sureties on—*

SINKING FUND—*statutes construed—*

EMBEZZLEMENT ACT—*construed—*

REPEAL BY IMPLICATION—*discussed—*

PUBLIC OFFICER—*presumption in favor of.*

The Commissioners of the Sinking Fund were empowered by section eight of an act of the General Assembly, approved March 8, 1861, to temporarily deposit the income of the fund while accumulating for distribution, or the purchase of certain bonds therein named, *or for other purposes of law*, in responsible banking institutions, payable on demand, with interest for the benefit of the fund; and the act provided that all interest on such deposits should be carried into the fund, and become a part thereof.

Said section was not repealed by the subsequent legislation of 1865, and 1867, whereby the custody of the fund was transferred to the Auditor of State, and the permanent character of the investment thereof was changed.

The Auditor of State succeeded to all the rights conferred, and to the liabilities imposed upon the Sinking Fund Commissioners by the act of 1861.

Therefore, it was the duty of the Auditor of State, in case he loaned any portion of the fund, to do so in conformity with the statute of 1861; and if he loaned it otherwise, he and his sureties are liable in a suit on his official bond, for all interest received by him on such loans.

The same liability exists for interest that might have been received by the fund if it had been deposited in conformity with the act of 1861, where the Auditor has used the money of the fund in an *unauthorized* manner.

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The word "income," as used in the eighth section of the act of 1861, included both principal, and interest of the money of the Sinking Fund that came into the hands of the commissioners, and authorized the temporary deposit of both principal and interest.

The Auditor of State will be presumed to have done his duty as such officer, until the contrary is shown.

By the embezzlement act of 1861, the officers therein named are prohibited from using public funds in their hands, as their own, or in any manner not authorized by law; such moneys, therefore, could not become the property of the officer holding them, but remained the moneys of the particular fund on account of which they were paid to such officer.

The word "may," in a statute conferring authority upon a public officer, will be construed to mean "shall," when the public, or third persons have a claim, *de jure*, that the power shall be exercised.

Hanna, Claypool, and Taylor, for State, appellant.

W. M. McCarty, Gordon, Browne & Lamb, for appellee.

NEWCOMB, J.—The complaint alleges that the defendant McCarty, from March 11, 1867, to the — day of January, 1869, was Auditor of State of the State of Indiana, and that on said first named day the defendants executed their bond to the State in the penal sum of \$100,000, conditioned that said McCarty would faithfully discharge the duties imposed upon, and required of him, in accordance with the provisions of the acts of the General Assembly of December 21, 1865, and March 11, 1867, and that he, said McCarty, would safely keep, and account for any moneys that should come into his hands under either of said acts, and faithfully perform his duties in the management of the Sinking Fund.

The breaches assigned are:

First. That McCarty received, and had under his control at divers times, and during his continuance in office large sums of money (set out in the complaint) belonging to the Sinking Fund; that he used the same in his own business, and loaned the same to bankers, and brokers, and other persons at large interest, and made, and received profits, interest, and income by the use, loan and deposit of the same, to

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the amount of \$100,000, which he failed to account for, and pay over to his successor, but converted the same to his own use.

Second. That he received said sums of money belonging to the Sinking Fund, and by the statute aforesaid it was his duty to deposit the same at the highest rates of interest that could be obtained therefor, and keep the same distinct from other funds, and that he could during all said time have deposited the same with solvent banks at seven per cent. interest per annum; that he refused to so deposit the same, but mixed said funds with his own individual money, and loaned, and deposited them in his own name, and received profits, interest, and income therefrom to the amount of \$100,000, which he failed to pay over, etc., but has converted the same to his own use.

Third. The third breach is substantially the same as the second, averring that it was the duty of the defendant McCarty to loan the sum to solvent banks, etc., and collect interest, and add the sum to the principal, and that he could have so loaned it at seven per cent. interest, but that he loaned and deposited it in his own name, and account, and received interest, and converted the same to his own use.

Fourth. That McCarty received the money as before alleged; that he, and the other defendants, his sureties, formed, and entered into a conspiracy and confederation to take, and use said fund, and loan the same in their own names for their use, etc., and that in pursuance thereof they did loan the same, and received interest, profits, and income therefor amounting to \$100,000, which sum, in pursuance of said conspiracy, with the assent, and permission of McCarty, they converted to their own joint, and several use, etc.

Demurrers to the complaint, and to each breach assigned, were sustained at Special Term, on the ground of a want of sufficient facts to sustain the action, and final judgment was rendered on the demurrer in favor of the defendants, from which judgment the State appeals.

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To arrive at a proper understanding of the questions involved, a brief review of the history of the Sinking Fund, and the statutes governing its accumulation and disposition becomes necessary. On the 28th of Janury, 1834, an act of the General Assembly, entitled "An Act establishing a State Bank," took effect. This act provided for the creation of a bank in which the State was to own one-half, and individuals the other half of the capital stock. To enable the State to pay for her stock, and to assist citizen stockholders in paying the second and third installments of theirs, it was provided by section 103 that the State should negotiate a loan of \$1,300,000 in specie, at a rate of interest not exceeding five per cent., redeemable after twenty years, and within thirty years, at the pleasure of the State, for which bonds were to be issued by the State. The amount of the State stock in the bank was fixed at \$800,000, and the residue of the five per cent. loan was re-loaned to private stockholders, and other parties on real estate mortgages, drawing annual interest, and the accruing interest was invested in the same way until March 1, 1859, when further mortgage loans ceased by virtue of the statute of that date providing for the distribution of the fund among the several counties. The manner of creating a sinking fund to repay the State's five per cent. loan, and to accumulate an educational fund was prescribed by sections 113, and 114 of the act of 1834. Those sections read as follows:

SECTION 113. There shall be created a fund to be called the sinking fund, which shall consist of all unapplied balances of the loan for its stock in the State Bank, or for the purpose of being loaned to stockholders to enable them to meet their stock installments in the bank, the semi-annual payments of interest on the State loans to stockholders, and the sums that shall be received in payment of said loans; the dividends that shall be declared, and paid by the State Bank on the State stock, and the dividends accruing on such

portions of the stock belonging to the other stockholders as shall have been paid for by the loan on the part of the State, and which shall not have been repaid by such stockholders.

SEC. 114. The principal and interest of said sinking fund shall be reserved and set apart for the purpose of *liquidating and paying off the loan, or loans*, and the *interest thereon* that shall be negotiated on the part of the State for the payment of its stocks in the State Bank, and the second, and third installments on the shares of other stockholders in said bank, *and shall not be expended for any other purpose*, until said loan, or loans, and the interest thereon, and incidental expenses shall have been fully paid, and after the payment of said loan, or loans, and the interest, and expenses, the residue of said fund shall be a permanent fund, and appropriated to the cause of common school education, in such manner as the General Assembly shall hereafter direct."

It is proper to remark here, that in addition to the sums set apart for the sinking fund, a part of the surplus revenue of the United States, which was assigned to this State by virtue of the act of Congress of June 23, 1836, was, under the provisions of an act of the General Assembly, approved February 6, 1837, used by the State to increase her stock in the State Bank, and on the expiration of the bank charter, and the division of the assets of the bank among its stockholders, that portion of the surplus revenue became a part of the sinking fund.

It is not important to cite the subsequent legislation of the State touching the Sinking Fund, previous to the adoption of the Constitution of 1851.

Article VIII, section 2 of that instrument defines what shall constitute the common school fund, and among other items designates:

"The surplus revenue fund." "The bank tax fund, and the fund arising from the 114th section of the charter of the State Bank of Indiana."

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Sections 3, 4 and 7 of said Article make further provisions concerning the safety, perpetuity and income of the school fund, namely:

"SEC. 3. The principal of the Common School Fund shall remain a perpetual fund, which may be increased but shall never be diminished; and *the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever.*"

"SEC. 4. The General Assembly shall invest, in some safe and profitable manner, all such portions of the school fund as have not heretofore been entrusted to the several counties; and shall make provision by law for the distribution among the several counties of the interest thereof.

SEC. 7. All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created."

No provision was made by law for applying any of the income of the Sinking Fund to the use of common schools, until the passage of the act of March 1, 1859. 1 G. & H., Stat. 574. This act directed the Sinking Fund Commissioners to distribute the fund among the several counties in proportion to the number of children in each county listed for the purpose of common school education, and when it should be so distributed it was required to be loaned by the respective county auditors and treasurers upon real estate security, as other school funds were loaned, and it was provided that the interest accruing from such loans should be used for the purpose of school education.

The 8th section required the Commissioners to keep back in their hands a sufficient amount of mortgages and funds to redeem the bank bonds (the bonds issued under the act of 1834), which should not be distributed, but should be held as security for the payment of said bonds.

Sec. 5 empowered the Commissioners to purchase the bank bonds, when they could do so on reasonable terms.

We quote the 6th section entire :

"SEC. 6. After the year 1866, when the last of said bank bonds become due and payable according to the condition thereof, the said Commissioners shall immediately thereafter pay off and discharge the residue of said bank bonds, if any there be left, and as soon thereafter as possible collect all debts and convert all the property of said sinking fund into money, and distribute the same as fast as the same may come in, as required by the provisions of this act."

By the terms of the act approved February 22, 1861, commonly known as the embezzlement act, 2 G. & H., 456, it was made a felony for any officer or other person charged, or in any manner entrusted with any money, funds, securities or other property belonging to this State, or belonging to any fund under control of this State, or under control of any State officer, to convert to his own use, or to the use of any other person or persons, corporation or corporations, in any manner whatever contrary to law ; or to use by way of investment in any kind of property, or to loan, with or without interest, or to deposit with any person or persons, corporation or corporations, contrary to law ; or to exchange for other funds, except as allowed by law, any portion of such money, funds, securities or other property. This statute clearly embraced the Sinking Fund Commissioners and the fund under their control, as well as the Treasurer and other State officers having public and trust money confided to their charge, and unless excepted from its prohibitions and penalties, the Commissioners would be compelled to let the money realized from the payment of principal and interest from the outstanding mortgages belonging to the Sinking Fund, and also the income of other securities embraced in said fund, to remain idle and unproductive, until such time as enough should accumulate to justify a distribution among the several counties of the State, except so far as the same could be used up in the purchase of bank bonds. It was

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probably to meet this difficulty that the 8th section of the act of March 8, 1861, [3d Statutes, Davis' Supplement, 483,] was prepared. That section reads as follows:

"SECTION 8. The Commissioners shall be authorized to exchange, or convert the Indiana five per cent. stocks belonging to the fund into bank bonds, as the same can be procured, or purchased, on the best terms practicable, and while the income of the fund is accumulating for distribution, or for purchasing bank bonds, *or other purposes of law*, they shall have power to deposit the same in responsible banking institutions, with satisfactory security to the amount thereof at any time, at interest, for the benefit of the fund, but payable on demand. All interest that shall accrue on any deposit of sinking fund shall be carried to the fund, and become a part thereof."

The next legislation bearing on the questions arising in this suit was the act of December 20, 1865, 3 Davis Statutes, 490. This statute, it is insisted by the defendants, repealed the 8th section of the act of March, 8, 1861, and from that postulate it is argued that there was no law in force during McCarty's term of office, authorizing him to make temporary deposits; and that being the case, the State can not call upon him, and his sureties to refund any interest he may have realized from the loan, deposit, or use of the sinking fund in its hands, contrary to, or without authority of law.

That act directed the Commissioners of the Sinking Fund to invest the money then on hand, and what might be thereafter paid in of said fund, in Indiana State bonds, or stocks, if the same could be purchased at satisfactory rates, otherwise in United States seven-thirty bonds, the latter to be re-invested in the Indiana securities above named, whenever the same could be purchased at fair rates.

Provision was made for the surrender of the State bonds, or stocks, which might be so purchased, and for the execution, and delivery to the Sinking Fund Commissioners of

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the non-negotiable bonds of the State for the same amount bearing six per cent. interest, said interest to be distributed among the several counties at the same time, and in the same manner as other school funds were distributed.

On December 21, 1865, only one day after the taking effect of the statute giving the Commissioners a discretion to invest the money of the Sinking Fund in State, or United States securities, another act was approved, and went into force, known as the State Debt Sinking Fund Act; 3 Davis Stat., 499. This made the Sinking Fund proper a part of the State Debt Sinking Fund, and directed the money then on hand, and to accrue, to be invested in the two and one-half, and five per cent. stocks of the State, the same representing what was termed the foreign, or internal improvement debt of the State.

The seventh section of this statute provided for the abolishment of the Board of Commissioners of the Sinking Fund, and the transfer of their duties to the Auditor of State, as follows:

SECTION 7. The Board of Sinking Fund Commissioners, and all the offices connected therewith, are hereby abolished from, and after the 20th day of January, 1867, and all the property of whatever kind, both real, and personal, belonging to said fund, is hereby directed to be sold on such terms, in such manner, and at such time as said Sinking Fund Commissioners, during their continuance in office, and thereafter as the Governor, Auditor, Secretary, and Treasurer of State shall deem for the best interest of said fund, and the moneys arising therefrom shall be invested in said stocks of the State as in this act provided; and after the 20th day of January, 1867, the Board of Sinking Fund Commissioners shall surrender to the Auditor of State all the books, and papers, stocks, bonds, mortgages, moneys, rights, credits, and effects belonging to said fund, who shall provide a suitable place for their safe-keeping. From, and after the last mentioned date

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it shall be the duty of the Governor, Auditor, Secretary, and Treasurer of State to invest all the moneys arising from mortgaged premises, or other sources belonging to said fund, as fast as they are due, and collected, in the said five, and two and one-half per cent. stocks of the State."

The assets of the Sinking Fund having passed to the Auditor of State by virtue of the law of December 21, 1865, the General Assembly passed another act more fully defining his duties, and responsibilities, which was approved March 11, 1867—3 Davis Stat., 487. We copy so much of the first section as has any bearing on this case:

"SECTION 1. That for the purpose of enabling the Auditor of State to discharge the duties, and obligations of his office in relation to the custody, and management of the notes, bonds, and mortgages heretofore held, and managed by the Board of Commissioners of the Sinking Fund, arising directly out of loans made by them, all laws, and parts of laws heretofore adopted, and in force on the 20th day of January, 1867, applicable to the custody, and management of the said loans, and the notes, bonds, and mortgages, are hereby declared to be in force, the provisions of any law to the contrary notwithstanding. And the said Auditor is hereby clothed with all the power, and subjected to all the duties touching the said loans, and the securities therefor, which, by any law in force on the 20th day of January, 1867, were vested in, or imposed upon the said Board of Commissioners of the Sinking Fund, or any officer thereof."

The fifth section required the Auditor to give bond in the sum of \$100,000, with sufficient sureties, conditioned for the faithful performance of his duties under this law, and under the law of December 21, 1865, and for the safe keeping, and accounting for any moneys that had, or might thereafter come into his hands, under either of said acts; and, generally, for the faithful performance of all duties growing out of the management of the property, or business of the said Sinking

Fund. The bond in suit was executed in conformity with this section.

The sixth section provided that whenever the amount of money belonging to the Sinking Fund, in the hands of the Auditor of State, should reach \$4,000, or more, he should forthwith notify the Secretary, and Treasurer of State of the amount of said fund in his hands, and the Auditor, Secretary, and Treasurer were thereupon to invest the funds then in the hands of the Auditor, or under his control, in the five, and two and one-half per cent. stocks of the State, by purchasing the same on the lowest, and best terms they could be had for in the market.

The Auditor was required to keep a list of the stock so purchased, with the price paid therefor, and to report to the Governor at least once in three months, and to the General Assembly at each session, a full account of his transactions, etc.

Having thus noticed all the statutory, and constitutional provisions supposed to bear upon the case under consideration, we proceed to an examination of the questions arising therein, and discussed by counsel, namely:

First. Was the 8th section of the act of March-8, 1861, repealed by the subsequent legislation of 1865-7?

Second. If not so repealed, is that section constitutional?

Third. Does Article VIII of the Constitution make interest received by the legal custodian of the Sinking Fund, on loans made without authority of law, or contrary to law, a part of that fund, and if so, are McCarty, and his sureties liable therefore in a suit upon his bond?

Fourth. If the defendants are not liable on the bond, is McCarty liable on common equity principles as a trustee, and can such liability be enforced in this suit?

It has been argued with much earnestness by counsel for the defendants, that the statutes of December 20, and 21, 1865, necessarily repealed section 8, of the act of March 8,

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1861, authorizing temporary deposits of the income of the Sinking Fund while accumulating for the purpose of distribution, or the purchase of bank bonds. Undoubtedly the legislation of 1865 did repeal so much of the act of March 1, 1859, as provided for a distribution of the Sinking Fund among the counties, and also that provision authorizing the purchase of bank bonds, but the question remains, did it repeal that part of said 8th section of the act of 1861, which authorized such temporary deposits while the fund might be accumulating "for other purposes of law," or in other words, for other lawful purposes? That section was not expressly repealed by either of the acts of 1865, nor by the act of 1867. If repealed at all, the repeal was by implication, necessarily resulting from an incompatibility between the former, and the latter statutes. But the law does not favor a repeal by implication, and the rule of construction is, that when two statutes are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former. *Spencer v. The State*, 5 Ind., 41; *Blain v. Bailey*, 25 Ind., 165; *Bowen v. Lease*, 5 Hill, 221; *Wallace v. Bassett*, 41 Bard., 92; *Dwarris on Statutes*, 154-5.

"It has also been held, in pursuance of this maxim," says the Supreme Court, in *Elaine v. Bailey*, *supra*, "that an act is not repealed by implication where the Legislature had no intention to repeal it."

We are unable to perceive any legislative intention in the statutes of 1865-7 to make the Sinking Fund unproductive for any period of time, however brief. The purpose was to permanently invest it in a safe and profitable security, as rapidly as the same could be done, but no prohibition appears in either of the acts against temporary deposits of the fund, as authorized by the statute of 1861, while awaiting opportunity to make investments in State stocks.

The uniform current of legislation on this subject shows a purpose to make the fund at all times productive. Its

founders declared this purpose in the 114th section of the bank charter; the Constitution, in the sections cited, proclaims the same purpose, as do also the legislative acts of 1859, and subsequent acts.

Recurring again to the act of 1861, the conclusion seems to us irresistible that the Legislature contemplated the probability of subsequent legislation by which the investment of the undistributed portion of the Sinking Fund might be changed, and that in the event of such change the accumulations might be unproductive for a time, unless authority was given to temporarily deposit them at interest while awaiting opportunities for permanent investment. In view of such possible change of the law, the words, "or other purposes of law" were, in our opinion, introduced into that statute; for while the statute of 1859 remained in force there could be no other "purpose" of accumulation than for distribution among the counties, or the purchase of bank bonds.

While, therefore, there remained a "purpose of law" for the accumulation of the Sinking Fund in the hands of its legal custodian, so long that clause of section 8 of the act of 1861 was operative, and continued in force. It is urged, however, that the statutes of 1865 did not contemplate any accumulation of the fund in the hands of the Commissioners, or Auditor of State, consequently there could be no lawful accumulation, and therefore nothing was left to which the statute of 1861 could attach.

We are not inclined to place such a construction on this statute, especially as the results claimed for it would work injustice to public interests by transferring to the Auditor of State money that properly belongs to the school fund.

In 1865-7, as in 1859-61, that portion of the Sinking Fund available for distribution, or investment in bonds and stocks, consisted of the receipts of interest on mortgage loans, generally small in amount, from payments in full, or

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in part, of the principal of mortgage loans, and from interest on State bonds and stocks belonging to the fund. These payments were made at irregular intervals, except interest on State securities; were often in amounts too small to invest in the manner required, and must necessarily be held until a sum accumulated at least equal to the smallest denomination of bonds authorized to be purchased. Furthermore, the Auditor had to find some one who had bonds to sell before he could invest the money in them. True, during the one day the law was in force authorizing the purchase of United States seven-thirties, it might have been possible to instantly invest the money on hand in those securities, but we can not say as a matter of law that it was. And when we consider that while the Auditor was required to invest the funds in State stocks, sums ranging from \$61,000 to \$259,000 remained in his hands uninvested, and that the complaint does not charge him with failing, or refusing to purchase State stocks when obtainable, we may fairly presume that there was an inevitable accumulation in his hands. Indeed, in the absence of an averment to the contrary, we *must* presume that the Auditor did his duty under the law, so far as it was in his power, and that he could not find employment for all the money that came to his hands in the purchase of State stocks. *Mercer et al v. Doc*, 6 Ind., 80; *Evans v. Ashby*, 22 Ind., 15; *Culbertson v. Milhollin*, Id., 362; 2 Phillips on Evidence, 604.

The purpose of the statutes of 1865, and 1867 was, that the remainder of the Sinking Fund should be invested in the stocks of the State. That purpose was not changed by the circumstance that the Auditor might not be able to purchase stocks as fast as he received money from the assets of the fund, nor could it be changed by his willful failure when opportunity offered to purchase stocks. The lawful purpose, or the "purpose of law," in the words of the statute of 1861, remained, and could be changed only by subsequent legis-

lation. Therefore, while the money of the fund accumulated in the hands of the Auditor, it so accumulated for the purpose declared by law, and while so accumulating he was empowered by the act of March 8, 1861, to temporarily deposit it at interest for the benefit of the fund.

The defendants further insist that section 8 of the act of March 8, 1861, is unconstitutional in this, that it only authorizes a deposit at interest of the *income* of the fund, and that it carries the interest of such *income* to the principal of the fund, and makes it a part thereof, while Sec. 3, Art. VIII, of the Constitution, appropriates such income to the support of common schools, and to no other purpose whatever.

The word "income," primarily means the profit arising from an invested fund, or a business, or profession, and the like, and the rule is, that words used in a statute are to be construed in their ordinary, and usual sense, unless it is apparent that the Legislature used them in a different sense. Dwarria, 199, 203.

The acts of 1859, and 1861 are to be construed *in pari materia*, as though they were one act. We must, therefore, look to the act of 1859 to determine the sense in which the word "income" was used in section 8 of the act of 1861. The latter section provides that while the income of the fund is accumulating for distribution, or for purchasing bank bonds, it may be deposited, etc. Those two objects covered the entire fund, principal, and interest. All of it, except enough to redeem, or purchase the outstanding bank bonds, was required by the act of 1859 to be distributed. All money received in discharge of the *principal* of mortgages, as well as for interest, was to be held for distribution, or the purchase of bonds. The word "income," as used in the act of 1861, should receive a definition as broad as the subject matter to which it was applied, that being the entire money receipts from the securities in which the fund was then

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employed. We hold, therefore, that this word in the act of 1859 has the same meaning as the words *avails, moneys, or receipts*, and must be construed to embrace all receipts of money, whether of principal, or interest, from the mortgages, or other securities in which the fund had been previously invested.

As to that part of section 8 of the act of 1861, that requires interest received on deposits to be carried into the fund, and become a part thereof, we remark that it is an independent clause, which might be stricken out without invalidating the residue of the section. Therefore, if unconstitutional, the preceding part of the section may stand. *Cooley's Constitutional Limitations*, 177-181; *Bank of Hamilton v. Dudley*, 2 Peters, 526.

Furthermore, the circumstance that the statute may have directed the interest of the Sinking Fund to be employed in a manner contrary to the Constitution, did not transfer the ownership of such interest to the officer having control of the fund; the Constitution had set it apart for the support of common schools, and prohibited its diversion to any other object; it was the duty, therefore, of the Sinking Fund Commissioners, and afterwards of the Auditor of State, their successor in the trust, to account for such interest, in order that by the proper officers, or by subsequent legislation, if such were needed, it could be applied to its constitutional purpose. There could be no difficulty in separating the interest from the principal fund, and giving to each its proper direction, and we must presume that the Legislature would perform its constitutional duty by providing for the proper distribution of such interest.

It is further urged by the defendants that inasmuch as McCarty was liable absolutely for the safety of the fund committed to his charge, he had the right to determine how it should be kept, or employed while under his control, and that the money received by him was, while in his official

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charge, his money, and all that the State could demand of him was the return of an equal amount on the expiration of his term of office.

In support of this view, we have been referred to the cases of *Halbert et al v. The State*, 22 Ind., 125; *Morbeck v. The State*, 28 Ind., 86; *Rock et al v. Stinger*, 34 Ind.; *Hancock v. Hazzard et al*, 12 Cushing, 112; *United States v. Prescott*, 3 How., 578, and other authorities.

The point decided in *Halbert v. The State*, was that a public officer who is required to give bond for the proper payment of money that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but his liability is fixed by his bond, and the fact that the money was stolen from him without his fault, does not release him from his obligation to make such payment. The other cases cited decide the same principle, and some of them hold that public money received by such officer, in virtue of his office, becomes his money, to the extent at least that the body politic on whose behalf he receives it can not follow it, or securities given therefor by a person to whom the officer has loaned it, or improperly paid it out, but that the remedy must be sought on the officer's bond.

But, in our judgment, these authorities are not applicable to the case under consideration. The embezzlement act of 1861 placed the stamp of individuality on all public or trust funds received by the Auditor of State, and other officers therein named, and expressly prohibited them from using such funds *as their own*, or in any manner not authorized by law; and we think that as to the Sinking Fund the Constitution is to the same effect.

If we are correct in our conclusion that the act of March 8, 1861, authorized the Auditor to deposit in bank the receipts from the Sinking Fund while awaiting opportunity to permanently invest them in State stocks, it follows, as a legal

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consequence, that if the fund accumulated to such an extent as to render it necessary or advisable to place the same at interest, it was his duty to do so in the manner authorized by law, and that he could not by loaning, or depositing the fund in an unauthorized manner, relieve himself from his duty to account for interest received.

The permissive word "may" is used in the statute, but the rule of construction is that the word *may* will be construed to be synonymous with *shall*, where public interests and rights are concerned, and where the public, or third persons have a claim *de jure* that the power shall be exercised. *Nave v. Nave*, 7 Ind., 122; *Bansemmer et al v. Mace et al*, 18 Id., 27; *Newburgh Turnpike v. Miller*, 5 Johns., ch. 101. The people of the State, by virtue of the Constitution, and of the statute, had a right to claim that the money in the Auditor's hands, if placed at interest temporarily while awaiting investment, should be so placed as to secure to the school fund the interest that might be realized, and if the Auditor did, as charged in the complaint, otherwise use it, and receive interest from such use, when he could have deposited it in bank at interest, to the credit of the fund, he is accountable for interest so received. And we are of opinion further, that the Constitution, Sec. 3, Art. VIII, by its own inherent force, makes all interest received from the Sinking Fund a part of the School Fund; that by virtue of that section itself it was made the duty of McCarty to account for all interest he received; that as soon as it came to his hands it became a part of the School Fund, and if he has failed to pay the same to his successor, he and his sureties are liable in this suit on his official bond. If he used the money of the Sinking Fund in his own business, or in speculative operations, the defendants should be held liable on their bond for such interest as would have accrued in case the money had been deposited according to law, but not for the profits of any business in which McCarty may have

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employed the funds, for no such liability could have been in the contemplation of the sureties when they signed the bond, nor does it seem to be contemplated in the law under which the bond was executed.

The conclusions we have reached on the propositions above discussed, render it unnecessary that we shall examine the question whether McCarty can be held liable as a trustee merely, for interest, or profits received from the Sinking Fund, and we express no opinion on that subject.

At Special Term the defendants presented by demurrer the question as to the legal capacity of the Attorney General to institute, and prosecute this action. It is averred in the complaint that the suit is brought by the consent of the Governor; but it is insisted by the defense that the action could be brought only by the Auditor of State 1 G. & H., 119, sec. 2, or by the Attorney General when *required* by the Governor, or a majority of the officers of State. 1 G. & H., 118, sec. 4. The demurrer assigning that cause was overruled, the Judge at Special Term holding that the Attorney General, with the advice and consent of the Governor, was authorized by the joint resolution passed at the session of 1871—acts of 1871, p. 70—to commence, and prosecute the action in the name of the State. We concur unanimously in that ruling, and content ourselves with referring to the published opinion of Judge Blair on that part of the case, without a fresh discussion of the question here.

The judgment is reversed for the error at Special Term in sustaining the demurrer of the defendants to the complaint on the ground that it, and the several breaches did not set forth facts sufficient, etc., and the case is remanded for further proceedings in conformity with this opinion.

BLAIR, J.—I have been unable to reach the same conclusions with my brother Judges, or to change in any essential particular the opinion rendered at Special Term, and I have



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thought it right to give my views on one or two points involved in the case.

Prior to the 20th day of January, 1867, the Sinking Fund was under the control, and management of five commissioners, elected by the Legislature, known, and designated as the Sinking Fund Commissioners. Their powers, and duties were defined by law. The manner of loaning, and investing the fund for purposes of accumulation, was controlled by express statutory enactments; and it is true that by the eighth section of the act of 1861, 3 Stat., 483, the Commissioners were authorized to convert the Indiana five per cent. stocks belonging to the fund into bank bonds, as the same can be purchased on the best terms practicable; "and while the income of the fund is accumulating for distribution, or for purchasing bank bonds, or other purposes of law, they shall have power to deposit the same in responsible banking institutions, with satisfactory security to the amount thereof, at any time, at interest, for the benefit of the fund, but payable on demand."

The main question in this case depends upon the above provision. If this section is still in force, and applies to the Auditor of State in his management of the fund, there are forcible reasons for holding him liable on his official bond for interest acquired on deposits, and not paid over. The seventh section of the act of December 21, 1865—3 Stat., Davis' Sup., p. 502—abolished the Board of Sinking Fund Commissioners from, and after the 20th day of January, 1867, and at that date, all books, papers, stocks, bonds, mortgages, moneys, rights, credits, and effects belonging to the fund were to be surrendered to the Auditor of State, "who shall provide a suitable place for their safe keeping." By the further provisions of the same section it was made the duty of the Governor, Auditor, and Treasurer of State to invest the moneys belonging to the fund as fast as they should be collected, in the five, and two and one-half per cent. stock of the State.

No bond was by this act required of the Auditor of State, touching his duties relative to the custody and management of the Sinking Fund that was to come into his hands, and it seems to have been conceived by the Legislature that the duties of the Auditor in relation to the fund were not defined, and that the laws applicable to the management of the fund, loans, etc., in the hands of the Board of Sinking Fund Commissioners did not apply to the Auditor of State, and that he might have some difficulty in collecting outstanding loans, and indebtedness to the fund, and to remedy this defect the act of March 11, 1867, was passed, (3 Stat., Davis' Sup., p. 487,) continuing in force "all laws heretofore adopted, and in force on the 20th day of January, 1867, applicable to the custody, and management of the said loans, and the said notes." No laws governing the Board of Sinking Fund Commissioners were continued in force by express enactment, except those relating to the loans, and notes, and if necessary that there should be an express statute continuing these laws in force after the mortgages, and notes were transferred to the possession, and control of the Auditor of State, was it not equally necessary that the law relating to the management of the moneys should also be continued in force by express provisions of the statute? It seems to me that the act of 1867 recognizes the true rule of construction, and is an express recognition on the part of the Legislature, that the laws in force on the 20th of January, 1867, and before that time, governing, and defining the powers of the Board of Sinking Fund Commissioners, did not apply to the Auditor of State, and could not be made to apply to him except by express legislative enactment.

It might well be, that the Legislature would be willing to trust a judicious board of five commissioners with power to determine the "*responsibility*" of a banking institution, and the "*security*" given by the bank, when they would be unwilling to vest the same power in the hands of a single

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officer. The deposit of the money in a banking corporation is an important matter, requiring the exercise of sound discretion, and judgment to see that the fund is not endangered, and it seems to me a dangerous principle to sanction the transfer of such power from one officer, or class of officers to another officer, except by statutory enactment. If the act of 1865 had said that the Auditor shall be vested with all the power, authority, etc., then vested by law in the Board of Sinking Fund Commissioners, there could have been no doubt but that this eighth section of the act of 1861 would be held to be in force; but in the absence of any provision of the kind, I believe the Auditor had no authority given him to deposit the money in banking institutions, but that it was his duty, according to the provisions of the act of 1865, to keep the money under his immediate control, and custody, or, in the language of the act, "to provide a suitable place for their safe keeping." I do not believe that the power was intended to be given him by the Legislature to deposit the funds in banks, thereby releasing him, if the deposit was made in good faith, and in the exercise of reasonable care, from the absolute liability that would otherwise attach to him, as an officer, of keeping the fund secure from loss in any event. Under the act of March 11, 1867, the bond in suit was required to be given by the Auditor, and it is conditioned as provided in the act. This bond, is the contract made by the officer and his sureties with the State. If the Auditor is liable on the bond, his sureties are also liable. It is unnecessary to cite authorities to show that the liability of sureties can not be extended by implication beyond the terms and condition of their bond. It is the full measure of their liability. It does not follow that because the State may have a strong equity on her side, as against the Auditor, or because she may have a right to call upon him in his personal capacity to respond to her demands, that he, and his sureties are liable on his official bond. The question of

personal liability of the Auditor is not presented by the pleadings in the case, and hence is not proper to be considered here, for the suit is upon the official bond, and there must be an absolute breach of the conditions of the bond to sustain a recovery against the defendants. While no dry, or technical construction can defeat any rights which the plaintiff may have, there must still be a distinct breach of the contract to render the Auditor, and his sureties liable.

The language of the fifth section of the act of March 11, 1867, prescribed the conditions of the bond in suit, and the bond is conditioned as required by the act, "for the faithful performance of his duties under this law," (that is, under the act of 1867), "and under the law passed at the extra session in 1865," (that is, the act of 1865 which abolished the Board of Sinking Fund Commissioners, before cited) * * *

* * * "and generally for the performance of all duties growing out of the administration, or management of the property, or business of the Sinking Fund." Now, it is a rule of construction, that general words, or terms in a statute refer to, and are controlled by specific terms, hence the latter general clause in the statute, and in the conditions of the bond, I take it, refer to the general duties of the Auditor under the acts specifically referred to. But as I regard the eighth section of the act of 1861 as inoperative, and can not be applied to the Auditor, a rigid application of the above rule is unnecessary for the purpose of the present case.

I have also been unable to find that the liability of the defendants can be in any way increased by reason of the constitutional provisions contained in the third, and fourth sections of Article VIII, of the Constitution. Section three prohibits the principal of the fund from being diminished, and says the increase of the fund shall be inviolably appropriated to the support of common schools. Section four makes it the express duty of the Legislature to invest the

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fund in some safe and profitable manner. This must, of course, be done in accordance with some law enacted by the Legislature, defining the safe, and profitable manner of investment.

If the Legislature has neglected to pass the necessary laws to keep the money invested as required by the Constitution, but has suffered it to accumulate in large amounts, and lie idle in the hands of the Auditor of State, he, as an officer being liable for its safe keeping in any event, even if it should be stolen from him, I do not see that the Constitution enlarges his liability for interest received on deposits of the fund, when the principal, and all accumulations provided for by law are accounted for at the proper time.

IN GENERAL TERM, 1872.

MARY GILLESPIE ET AL V. MICHAEL SPLAHN, Appellant.

Where the record of a judgment shows that process has been served on the defendant, an omission to enter of record a default will not render the judgment inadmissible in evidence against the defendant.

A certificate made by a Sheriff of the sale of real estate on an execution, is assignable, and will authorize the Sheriff to make a deed to the assignee.

The return of a Sheriff upon an execution as to matters required to be returned in the discharge of his official duties, can not be contradicted by the Sheriff, nor by the parties to the execution, by parol evidence, except in a direct proceeding.

Where it is shown by return, that a summons has been served in accordance with the provisions of a statute, the party served can not, in a collateral proceeding, show by parol that he had no notice of the action in which the summons issued.

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An innocent purchaser of property, sold at Sheriff's sale on an execution, can not be effected by an irregularity in the issuance of the execution.

Barbour & Jacobs, for Appellant.

McDonald, Butler & McDonald, for Appellee.

BLAIR, J.—This is a suit to recover possession of certain real estate, and damages for the detention of the same.

The defendant answered in two paragraphs. First, a general denial, and second, that the plaintiff claims title by virtue of a deed from the Sheriff of Marion county upon the foreclosure of a mortgage given by the defendant to one Timothy Splahn; that the mortgage was drawn up by Christopher Werbe, and William V. Burns, who the defendant understood to be attorneys, and purported to be given to secure the payment of fourteen hundred dollars, but was in fact only given to secure a loan of seventy dollars; that the false amount was inserted in the mortgage by the advice of defendant's attorney, as the best means of securing to defendant "his house, and lot in case of an anticipated domestic difficulty, which fortunately did not prove to be serious, and no occasion ever occurred to use the mortgage for any other purpose than to secure the loan of seventy dollars," and it was not made to defraud any creditor, or any other person. That the mortgage was left at the Recorder's office, and duly recorded, and that he fully paid the mortgage before it was foreclosed; that one Wm. V. Burns, without any assignment of the mortgage, and without the knowledge, or consent of the mortgagor, or mortgagee, fraudulently procured the mortgage from the Recorder's office, and put it in suit, and prosecuted it to a final decree without the consent, or knowledge of the mortgagee, and the defendant says he never had any knowledge, or notice of the suit; that he was at the commencement of the suit, and for a long time thereafter, absent from Marion county, and if any summons was

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served by leaving copy at his residence, it was lost, or destroyed, and never came to his knowledge. The decree was rendered on the 6th day of October, 1866, and decree issued on the 7th day of February, 1868, and mortgaged property was sold on the 7th day of March, 1868, on a bid made in name of Chas. Coulon by said Burns, Burns, and Coulon knowing at the time that the mortgage had been paid, and the decree obtained fraudulently, and Coulon assigned the certificate to Mary Gillespie; that defendant did not know the property was advertised for sale, or sale made until a year after the sale was made; that he has resided upon the property at all times since the mortgage was made, and could have told any one enquiring that the mortgage had been satisfied, and Mary Gillespie could not, and did not acquire any greater right than Coulon, and Coulon never paid any portion of his bid of \$500, and the deed was made to Mary Gillespie before he knew of the sale, wherefore defendant prays that the claim of plaintiff, which is a cloud upon his title, may be removed, and judgment decree, and sale declared void, &c.

A demurrer being overruled to this answer, the plaintiff filed a general denial to the same.

The cause was tried before a jury, and a verdict returned for the plaintiff for possession of the real estate, and damages for its detention.

A motion of the defendant for a new trial was overruled, and excepted to, and judgment rendered on the verdict.

The first error complained of is the admission in evidence, over the objection of the defendants, of the record of the case of Timothy Splahn against Michael Splahn, and wife, the copy of the decree, and execution, and the deed of the Sheriff of Marion county to Mary R. Gillespie, the plaintiff.

The objection to the record was that it was incompetent, irrelevant, immaterial, and insufficient, and because it was not made within the time required by law. It is urged that

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the record does not show that the defendant was defaulted, or that a rule was taken against him for an answer. It being shown that there was service upon the defendant by leaving a copy at his last, and usual place of residence, the omission to enter a default is immaterial, and no rule for answer could have been entered unless there was an appearance for the defendant. The gist of the defense in this action seems to be that the defendant did not appear to the former suit, or have actual notice of the suit; and hence we think the evidence was properly admitted.

It is urged that the deed of the plaintiff from the Sheriff ought not to have been admitted in evidence, because it is shown that she was not the purchaser at Sheriff's sale, and that the certificate of sale made by the Sheriff to Coulon, the purchaser, is not assignable, and the Sheriff is not authorized to make a deed to an assignee of such certificate, because the statute, "Sec. 372, 2 G. & H., p. 250," directs the deed to be made "to the purchaser," and such certificates are not enumerated among the instruments that are assignable by the first section of the act of March 11th, 1861. It seems to us that the certificate in such case is an instrument by which the Sheriff promises "to convey property," and is, therefore assignable under the provisions of the act cited.

This also seems to be clearly recognized by the act providing for the redemption of real property, approved June 4th, 1861, where it is said the property sold may be redeemed "by paying to the purchaser, his heirs, or assigns, &c., * * the purchase money with interest thereon at the rate of ten per cent. per annum;" and if the property is not redeemed the certificate "shall entitle the holder thereof to a deed of conveyance to be executed by the officer making the sale at the expiration of one year from the date of the sale." Sec.'s 1, and 2 of the above act, 2 G. & H., p. 251. It is true that the terms of this last cited act would not perhaps make such certificates assignable, if it was clear by the other

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acts that it was intended that such certificates should not be assignable, or that the Sheriff could only make a deed to the purchaser; but it must be remembered that certificates were not authorized to be made by sheriffs until after the passage of the last act, which is one for the benefit of the judgment debtor, by withholding a deed from the purchaser for one year, and giving the debtor a chance to redeem the premises, and as the act clearly recognizes the fact that they may be assigned, and a conveyance made to the holder, the objection urged is untenable. To hold otherwise would in many cases be a hardship on the purchaser without any corresponding benefit to the judgment debtor.

The next error complained of is the exclusion of evidence offered by the defendant to show the falsity of the return of the Sheriff, as to the payment of the purchase money bid at the Sheriff's sale, that Charles Coulon was the highest bidder, and that the real estate was sold to Coulon. These were material facts, necessary to be shown by the return, and the return being complete, it became, and is record. *Hobson v. Doe*, 4 Blackf., 487; 2 G. & H., 259, Sec. 517. The plaintiff had received the certificate of sale made by the Sheriff to the person shown by the record to be the purchaser, and the transaction was completed by the making of the deed to the plaintiff. While it may be true that the holder of a certificate by assignment, before the execution of a deed is not such an innocent purchaser, and so far protected as an assignee, but that the judgment debtor might show that the purchaser did not pay his bid, or that the assignor was not really a purchaser, (points, however, which we do not decide,) we are satisfied that the proposition to contradict the return by parol evidence in this collateral way, comes too late, the conveyance having been made, the return being in all respects regular on its face, and the entire transaction completed without any notice to the holder of the certificate previous to, or at the time of the purchase of the certificate.

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or the making of the deed, that the return was false in any particular.

There is no evidence in the record, nor does it show that any was offered to be given tending to show that the plaintiff had any notice that the return was false.

There is some uncertainty in the adjudicated cases as to the rights of parties to contradict the return of a sheriff upon material matters required to be returned in the discharge of his official duties, but we think it may be considered as settled that neither the sheriff, nor the parties to a judgment, like the case at bar, can contradict the return except by a direct proceeding. Herman on Estoppel, 52, 53, 230, 179, and authorities there cited. The case cited by defendant, of *Owen v. Ranstead*, 22 Ill., 191, was a direct proceeding to enjoin the collection of a judgment by execution, the plaintiff averring that there was a defect in the service of process, and that the return was untrue, and that he did not owe execution plaintiff. The case is not, therefore, an authority in support of the position claimed by the defendant.

The rule may seem a harsh one in a case like the one at bar, where there would seem to be many equities in favor of the defendant, but if he has slept upon his rights until the property has passed into the hands of an innocent purchaser, it is not reasonable that the innocent party should suffer loss on account of the negligence of the defendant, or of a fraud practiced by those who were placed in a position to perpetrate the fraud by the defendant.

It is claimed that the Court erred in excluding the evidence offered to be shown by the testimony of the defendant that he was absent from his home in Marion county, and that he had no notice of the suit. The service shown was by leaving a copy of the summons at the last usual residence of the defendant, conforming in all respects to the requirements of the statute, and hence was sufficient service, and the evidence offered was rightly excluded.

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The next error complained of was the offer of the defendant to prove by Timothy Splahn, the execution plaintiff in the case in which the property was sold, that he never authorized an execution to issue, nor did he hear that one was issued until after the sale. The plaintiff standing in the position of an innocent purchaser, could not be affected by the irregular issue of the execution, and hence the ruling of the Court in excluding this evidence was right. *Soles v. Harvey*, 20 Ind.

The defendant offered to prove that the mortgage upon which the decree was rendered, and the property sold was given to secure the sum of seventy dollars, and no more, and that the whole amount actually due upon the mortgage, principal, and interest was paid by the defendant, Michael Splahn, to Timothy Splahn, the judgment creditor, before the decree was issued upon which the property was sold. This evidence was excluded by the Court, and excepted to by the defendant. It was distinctly admitted by the parties that at the time the decree issued for the sale of the property the record of the Court did not show any satisfaction of the judgment therein rendered. The decree was for the sum of \$1,406.66. As we understand the bill of exceptions, the defendant offered to prove that he never really owed the judgment creditor that much, that he only owed him seventy-six dollars, which amount was paid by the defendant after the decree was rendered, and before the sale was made.

In the first place, this evidence would tend to impeach the original finding, and judgment of the Court, and this could not be done in a collateral proceeding. The amount found to be due by the Court, and for which a judgment, and decree was rendered in favor of the plaintiff in this cause, would be conclusive against the defendant until reviewed, or set aside by a direct proceeding.

Our attention has been called to the case of *Wood v. Colvin*, 2 Hill, 566, as an authority to show that although a

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judgment may on the record be unsatisfied, yet if has actually been paid by an arrangement between the parties, a sale after such payment would be without authority, and even a *bona fide* purchaser would in such case acquire no title.

An examination of the case does not, however, sustain this position. There was in that case no *bona fide* purchaser, for the purchaser himself was a party to the transaction by which the judgment had been paid, and hence the statement of the judge is not authority. This was followed by the case of *Cameron v. Irwin*, 5 Hill, 372, where Cowen, Judge, followed the dicta in the former case of *Wood v. Colvin*, and asserted the same principle, although in the case before him it was not necessary to the decision of the question before the Court. In the later case of *Warner & Loop v. Blakeman et al*, 36 Barbour, 501, the dicta of the former cases was overruled, and a different principle announced.

In the case of *Laval et al v. Romley*, 17 Ind., 36, the case of *Wood v. Colvin supra* is cited as authority for the same dicta, for in the case then before the Court Romley was the purchaser, and he himself had extinguished the debt upon which the property was sold. Even in the case of *Wood v. Colvin* it is admitted that if there is some fault on the part of the judgment debtor, the rule would not apply. This is obvious from the fact that if there has been negligence on his part it would be wrong to impose the consequences of that negligence upon a person in no way shown to be at fault. An application of the dicta in the case of *Wood v. Colvin* to all cases would enable judgment creditors, and judgment debtors to wrong innocent parties, and leave them without remedy. And this principal is sustained by the case of *Warner & Loop v. Blakeman supra*.

In the case at bar it is shown by the pleadings as well as the evidence that in the original execution of the mortgage there was an intention to deceive, and if it has recoiled upon their own heads they ought not to attempt to throw the loss

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upon one not at fault. We do not, therefore, believe that the position assumed by the defendant is sustained by authority, and the evidence was properly excluded.

Exceptions were taken to the *first, second, and third* instructions given by the Court, but as no special objections have been pointed out, and they are in accordance with the rulings upon the evidence here announced, we think they were correct. So with reference to the *first, second, third, and fourth* instructions asked by the defendant, and refused by the Court.

The judgment is affirmed.

IN GENERAL TERM, 1872.

ROBERT CURRY v. SARAH CURRY.

Appeal from BLAIR, Judge.

DIVORCE—*when insanity, no cause for*—

STATUTE—*construed*—

APPEAL—*from a judgment on "seventh clause"*—

INSANITY—*when may be cause for divorce.*

The statute does not confer authority upon our Courts to decree a divorce to a party on the sole ground that the defendant has become hopelessly insane, at least when such insanity has not been superinduced by a vicious, or reckless course of conduct on the part of defendant.

Under the *seventh* clause of Section *seven*, of the Divorce Act, the discretion of the Court is to be exercised "for any other cause," but there must be an injured party, to whom only, on application, divorces are granted, to give cause of divorce.

The husband, of a wife who has lost her reason, is not an injured party,

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within the meaning of the statute, because the sufferer is not a wrong doer, and when no wrong has been committed by one party to the marriage contract, it is impossible that there can be, in a legal sense, an injured party.

An appeal lies from a judgment under the seventh—discretionary clause—of this act.

L. M. Campbell (of Danville), for plaintiff.

C. L. Holstein, *Guardian ad litem* for defendant.

NEWCOMB, J.—This was a proceeding for a divorce. After stating that the parties were married in the year 1841, and that they lived together as husband, and wife until the year 1857, and reared a family of children, now grown to manhood, and womanhood, the petition alleges: "That during the year 1857 said Sarah lost her reasoning faculties, and became insane; that plaintiff immediately and promptly resorted to the use, and procurement of every, and all means, and remedies known to the most eminent physicians of the age, and country, for the purpose of restoring the mind, and health of said Sarah, but without success; that since that time to the present he has continued his efforts for her restoration, and has had her placed under treatment at the Indiana Hospital for the Insane, where she has been kept, and treated for about half the time, that the balance of the time she has been kept, and cared for in the family of said plaintiff, all of which has occasioned him great expense, and which efforts, and medical treatment have availed nothing towards the restoring of said Sarah."

"That she has been pronounced incurable, and is hopelessly insane."

"That by reason of her misfortune she has become troublesome, disagreeable, and repulsive to her own children, having lost every attribute of humanity; that plaintiff has been impoverished, and himself, and his family made utterly, and indescribably miserable by reason of the continued insanity

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of said defendant, that her presence in the family, and the knowledge of his relations to her, make his life almost a burden, and that his, and her children desire that he may be divorced from said Sarah."

On these facts, with the additional averment that defendant, at the time of the filing of the petition, was an inmate of the Hospital for the Insane, the plaintiff asked a divorce, and that the Court should charge him with the payment of a reasonable sum annually for the support of the defendant.

A *guardian ad litem* was appointed by the Court to defend the interests of the defendant, who filed a demurrer to the petition. His Honor, Judge Blair, before whom the cause came at Special Term, sustained the demurrer, and rendered final judgment against the petitioner, from which judgment he prosecutes this appeal.

Insanity, however hopeless of cure, is not a specified statutory cause of divorce in this State, but the seventh clause of Section seven, of the Divorce Act, 2 G. & H., 351, authorizes the granting of a divorce for any other cause than those enumerated, "for which the Court shall deem it proper that a divorce should be granted."

It was under this grant of discretionary power that the petitioner prayed the Court to pronounce a divorce.

The Judge who presided at Special Term having held that confirmed insanity was not a cause of divorce, we are asked to review, and reverse his decision.

It has been held by the Supreme Court in this State, in *Ritter v. Ritter*, 5 Blackf., 81, and in *Ruby v. Ruby*, 29 Ind., 174, that an appeal lies from the judgment of the lower courts in a case arising under the discretionary clause of the statute concerning divorces. The appeal lies, therefore, in this case; and we are brought to consider the single proposition, whether the long continued, and incurable insanity of the wife is a sufficient cause for granting the husband a divorce.

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If the statute has clothed us with power to decree divorces for this cause, the petition presents reasons as cogent perhaps as can be found in any case, for the exercise of such power ; but, upon a careful consideration of the question, we are satisfied that the decision at Special Term ought not to be disturbed.

It is not charged that the malady of the wife resulted from any misconduct on her part, or that she did any act in violation of her marital duties while sane. She, therefore, has committed no wrong against the husband.

The statute provides that divorces shall be granted, on the application of *the injured party*, for certain enumerated causes, and for any other cause than those enumerated, "for which the Court shall deem it proper that a divorce should be granted." Taken by itself, the latter clause would seem to confer upon the Court trying a divorce case, entire, and full discretion to grant a divorce for other than the specified causes. Such, however, is not the case. In discussing a similar statute, Judge Dewey, in the case of *Ritter v. Ritter*, *supra*, said: "That power, ample as it is, is not entirely without limits. The statute requires a *cause* of divorce, on which the discretion of the Court is to be exercised. The conclusion of the judgment that such cause is reasonable, *and such a one as forfeits the marriage contract on the part of the wrong doer*, or otherwise, is not an act of legislation."

* * * Like all discretionary power in Courts, it must be exercised in a sound, and legal manner; it must not be governed by caprice, or prejudice, or wild, and visionary notions with regard to the marriage institution," etc.

The statute places a limitation upon the power of courts in divorce cases, which, in our judgment, is fatal to the present suit. There is no authority conferred to grant a divorce except "upon the application of the injured party." Where no wrong has been committed by one party to the marriage contract, it is impossible that there can be, in a legal sense,

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an injured party. Where no wrong has been done by the party against whom the divorce is sought, a divorce can not be granted. *Gul'ett v. Gullett*, 25 Ind., 517.

It is a great, and irreparable injury to a husband for his wife to lose her reason, but he is not an injured party within the meaning of the statute, because the sufferer is not a wrong-doer. The injury may be classed among those other accidents, or calamities that are, in law, deemed the acts of God, for the consequences of which no legal right of action accrues. *Actus Dei nemini facit injuriam*.

We hold, therefore, that the State of Indiana has not conferred authority upon her courts to decree a divorce to a husband on the sole ground that the wife has become hopelessly insane; at least when such insanity has not been superinduced by a vicious, or reckless cause of conduct on her part.

The judgment at Special Term is therefore affirmed, with costs.

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IN SPECIAL TERM, 1872.

WILLIAM C. SMOCK v. WM. HENDERSON, JAMES O. WOOD-
RUFF, DELOSS ROOT, WILLIAM BRADEN,
THOS. A. HENDRICKS.

A demurrer to evidence admits all facts, and conclusions which the evidence conduces to prove. The court, in considering the demurrer, must be liberal in its inferences in favor of the plaintiff, and must consider every fact as proved which a jury might legally, and reasonably have inferred in his favor, avoiding, however, all forced, or violent inferences.

Where it is shown that a certificate of stock in an incorporated company has been assigned, and after its assignment it was surrendered to the company, and other certificates issued for the same stock, to no greater amount than the stock surrendered, in the absence of any proof to the contrary, it will be presumed that the stock was surrendered with the assent of those to whom it was assigned.

A transfer of shares of stock in an incorporated company, without assignment upon the books of the company, is good as between the parties.

The provision requiring a transfer of stock on the books of a corporation, is for the benefit of the corporation, but if the corporation assent to a transfer otherwise than on the books, and by such transfer the persons to whom the stock is transferred become stockholders, the corporation can not object, nor can the stockholder, as long as he is in fact a stockholder.

Evidence showing that the holder of a certificate of stock in an incorporated company has never been denied any privilege as a stockholder, and that there has never, at any time, been certificates of shares outstanding to an amount greater than the authorized capital stock, and that the shares held were issued in lieu of a certificate of shares surrendered will not sustain a charge of over issue of stock.

Under the act of the Legislature "to authorize the construction of water works," (Acts of Reg. Session 1865, p. 103), it was not necessary that the whole, or any amount of stock should have been taken, before the organization was completed, and not being required by the act itself, there is no other rule of law requiring it.

Under the act authorizing its organization, the water works company could

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take the Central Canal by purchase, and issue stock in payment therefor, but the amount so issued to be consistent with honesty of purpose, should be reasonably proportionate to the value of the canal.

The fact that the canal purchased, and owned by the Water Works Company has no value, does not show that the stock in the corporation is without value.

Stock to the amount of \$500,000, the full amount authorized to be issued by the Water Works Company, was issued on receiving a conveyance of the Central Canal. One-half of this amount of stock was received by the stockholders of the Canal Company, the consideration named in the deed conveying the canal was \$200,000, and by the terms of the agreement of purchase the other half was to come back, and did come back to the defendants for their own use:

Held: That the defendants, and the stockholders in the Canal Company, being the owners of the stock, and parties to the agreement under which it was issued, as long as they held the stock themselves no one could be injured but themselves, by reason of the transaction reducing the value of the stock.

The fact that it is stated on the face of a certificate of stock, "paid in full of the value of fifty dollars per share," shows that the shares are not liable to further calls. It can not be held to mean that the corporation has money, or property equal in value to the par value of the stock, and is not a representation that can be relied on by a purchaser as indicating the value of the stock.

Fraud may be shown by reason of false representations made by a seller to induce a purchaser to buy shares of stock.

But in the absence of any false representations by which a purchaser is induced to buy shares of stock in an incorporated company, although the stock may have been depreciated in value before the purchase by the acts of parties managing the business of the corporation, the purchaser can not recover against such parties.

Dye & Harris, for plaintiff.

Hendricks, Hord & Hendricks, Porter, Harrison & Hines,
for defendants.

BLAIR, J.—The complaint in this case contained five paragraphs. To the first, and third paragraphs demurrers were sustained, and these need not now be considered.

The second paragraph is, in substance, as follows: That the Water Works Company is a corporation, duly organized

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under the laws of Indiana; the amount of stock subscribed was only six hundred dollars, no part of which has ever been paid, and no certificates of stock were ever issued therefor; that in June, 1870, the defendants were directors of said corporation, and as such directors, in violation of their legal duty, and without any payment, or subscription of stock, and without any consideration moving to the corporation, wrongfully, and unlawfully issued certificates of stock in said corporation, to the amount of \$500,000, to one Harmon Woodruff, and to themselves, and recited on the face of the certificates that the stock had been paid in full, when in fact nothing had been paid, and the certificates represented no real value, and were issued with a fraudulent intention of selling them in the market for a value they did not possess; that the plaintiff purchased certificate number twenty-five, for one hundred and sixty shares of fifty dollars each, of said stock, believing the same to represent paid up capital of said corporation, when in fact it did not represent any capital stock, paid, or unpaid; that he paid therefore the sum of four thousand dollars, and it is of no value: wherefore the plaintiff says he has been damaged.

The fourth paragraph charges that the defendants, as directors, while certificates of stock to the full amount for which they were authorized to issue stock were outstanding, issued other certificates of stock, one of which, for one hundred and sixty shares, was issued to the plaintiff, for which he paid four thousand dollars, believing the same was a genuine, and legal certificate: wherefore he says he has been damaged, etc.

The fifth paragraph, after alleging the organization of the company, and the subscription of stock, as in the second paragraph, and that it was never paid in, nor certificates issued therefor, charges that afterwards, the defendants made an agreement with Harmon Woodruff, and others, which agreement is made a part of the complaint. The agreement

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was made on the 17th day of May, 1870, and is between the Indiana Central Canal Company, by Harmon Woodruff, Benj. Gould, and Henry R. Seldon, agents of said Canal Company, of the first part, and the defendants, William Braden, Deloss Root, Thomas A. Hendricks, William Henderson, and James O. Woodruff, of the second part, and it is agreed therein:

First. That the Canal Company should convey to the Water Works Company of Indianapolis that part of the Indiana Central Canal north of Morgan county, including all appurtenances, leases, etc., thereto belonging.

Second. The Water Works Company was to accept the conveyance of the Canal "in full payment, and satisfaction for five hundred thousand dollars in amount of its capital stock, (being the full amount of stock which it is entitled to issue,) and shall deliver to the party of the first part certificates of full paid stock, not subject to further call for such five hundred thousand dollars, in such amounts as shall be required by the party of the first part." The Water Works Company also to assume the responsibility of suits pending in favor of, or against the Canal Company, or any of the members thereof, growing out of the property, or business thereof, etc.

Third. If any further issue of stock is made by the Water Works Company, the stockholders to have the privilege of taking the same, etc.

Fourth. The Water Works Company to execute to William Henderson, and James M. Ray, as trustees, a mortgage upon the whole of the property conveyed to said company, conditioned as security for the payment of the bonds of said company, to the amount of three hundred and fifty thousand dollars, payable in not less than twenty years, and bearing interest at the rate of eight per cent. per annum, payable half yearly, the principal, and interest to be payable in gold.

Fifth. Twenty thousand dollars in amount of said bonds

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to be delivered to the Canal Company "for the purpose of satisfying its indebtedness," to be delivered on satisfaction of a certain mortgage lien upon the canal property being entered of record.

Sixth. The parties of the second part (the defendants) to receive the remaining three hundred and thirty thousand dollars of bonds, and apply the same, or the proceeds of the sale thereof, "at the rate of ninety cents on the dollar of the nominal amount thereof, to the construction, and putting in operation of water works in the city of Indianapolis, according to the terms of an ordinance authorizing such construction, etc." The said parties to superintend the application of said moneys to the work, under the general direction of Mr. Holly, of the Holly Manufacturing Company—the work to be done promptly, and at cash prices for labor, materials, etc. The bonds to be deposited with the trustees, and to be issued to the parties of the second part, as the work progresses, on the certificate of the Holly Manufacturing Company as to the amount expended, the amount issued not at any time to exceed the amount expended, until the whole ninety per cent. of the three hundred and thirty thousand dollars shall have been expended, when the balance shall be issued.

Seventh. The Canal Company to convey, as soon as it may be issued, ten thousand dollars in amount of the capital stock of the Water Works Company to the parties of the second part, and to place two hundred and forty thousand dollars in amount thereof in the possession of William Henderson, James M. Ray, trustees, to be delivered to the parties of the second part, as follows: Fifty thousand dollars of stock for each seventy thousand dollars certified to have been expended in the construction of water works, and fifty thousand dollars of stock for each additional seventy thousand dollars so expended, until the whole ninety per cent. of the bonds issued shall have been expended, when the residue of the stock shall be delivered.

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Eighth. The parties of the second part took on the bonds out of the proceeds of the sale of so much thereof as shall not be otherwise paid; the income of the works is sufficient to pay the

The plaintiff then further charges, that the sale to the Water Works Company in pursuance of the agreement was wholly without value, as the defendant Harmon Woodruff well knew; that the Canal Company held only an easement in the real estate through which the canal flowed, and that the right, as to the Canal Company could not be legally transferred to the Water Works Company, nor could the Water Works Company, by, or under its charter, take, or hold the franchise of the Canal Company; and if the sale passed by a conveyance to the Water Works Company was useless, and unnecessary to accomplish the purpose for which the company was organized, and could not be the same; that the canal was encumbered by liens beyond its ability to supply, and had no surplus, which the defendants well knew, but that they made the agreement with the fraudulent purpose, and in creating a fictitious capital of the pretended amount of one hundred thousand dollars of said Water Works Company, and dividing the same among themselves, issuing certificates of stock therefor, and selling them as paid up capital of said company for a value they did not possess; that the defendants, after making the agreement, being of the Water Works Company: to carry out the purpose above set forth, elected the defendant, Harmon Woodruff, President of said company, and constituted him their agent to issue the certificates of stock, and with the knowledge, and consent of the other defendants, issued the certificates, reciting on the face of the same that they had been paid in full, and purported to represent the capital stock of said company; that certificate

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twenty-five, for one hundred and sixty shares, was issued to the plaintiff, and he purchased the same, believing that it represented, as it purported, paid up capital stock of said corporation, whereas it was fraudulently issued as aforesaid, and represented no capital stock, paid, or unpaid, and the money paid by the plaintiff for said certificate was not paid to, or received by the Water Works Company, and the stock so purchased by the plaintiff was, by reason of the fraudulent acts of the defendants, without value: wherefore plaintiff says he has been damaged, etc.

The defendant, James O. Woodruff, files his answer in general denial, and the other defendants join in an answer denying the matters alleged in each paragraph of the complaint.

The cause was submitted to a jury for trial, and after the plaintiff had closed his evidence, the defendants filed a demurrer to the same, and the right of the plaintiff to recover is now presented upon the demurrer.

It will be most convenient first to consider how far the the evidence supports the facts alleged in the complaint. The defendants having demurred to the evidence, the Court must be liberal in its inferences in favor of the plaintiff, and must consider every fact as proved which the jury might have legally, and reasonably inferred in his favor, avoiding, however, all forced, or violent inferences. The demurrer admits all facts, and conclusions which the evidence conduces to prove. *McCreary v. Fike*, 2 Blackf., 374; *Doe v. Roe et al*, 4 Blackf., 263.

Following the above rule, we find from the evidence that the Water Works Company was organized as stated in the complaint. That originally there was a subscription of stock to the amount of six hundred dollars, and this was all the stock ever subscribed. No portion of the stock subscribed was ever paid in, nor was any certificates of stock ever issued for the amounts subscribed. That the defend-

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ants were directors of the corporation at the time alleged in the complaint. That the defendants, in their personal capacity, and not as directors of the Water Works Company, made the agreement set out in the fifth paragraph of the complaint with the Canal Company, by her agents, Harmon Woodruff, and others, on the 17th day of May, 1870. That the Canal Company, in pursuance of the agreement, conveyed the canal to the Water Works Company, by a deed of date the 1st day of May, 1870. That the Water Works Company, by her Board of Directors, accepted the canal in full payment, and satisfaction for five hundred thousand dollars in amount of her capital stock, that being the full amount which she was allowed to issue, and the defendants, as directors, caused certificates of stock to that amount to be issued. Certificate of stock No. 1 was issued on the 7th day of June, 1870, to Harmon Woodruff. This certificate was for five thousand shares of fifty dollars each, amounting to two hundred and fifty thousand dollars. On the same day, certificates numbered two to six, inclusive, were issued, conveying to each of the defendants forty shares, amounting in all to ten thousand dollars. Also, on the same day, certificate number seven was issued, conveying to Harmon Woodruff four thousand eight hundred shares, amounting to two hundred and forty thousand dollars. On the 13th day of June, 1870, certificate No. 1 was assigned by Harmon Woodruff to the various stockholders of the Central Canal Company, and the certificate was returned for cancellation to the Water Works Company on the 17th day of June, 1870, was canceled, and other certificates issued in lieu thereof, to divers persons, among which was the certificate to the plaintiff. At the time certificate No. 1 was returned, a list of stockholders of the Canal Company, and persons to whom stock was to be issued, was furnished to the Secretary of the Water Works Company, and the stock was issued according to the list. From the 6th of

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September, 1870, to April 22d, 1871, certificates of stock were issued to different persons, including large amounts to each of the defendants, in lieu of certificate No. 7, originally issued to Harmon Woodruff. This was the stock amounting to two hundred and forty thousand dollars placed by the Canal Company in the hands of trustees, to be delivered to the defendants as the work progressed, according to the agreement. The plaintiff purchased certificate No. 25, of James O. Woodruff, President of the Water Works Company. The contract of purchase was made on the 26th of May, 1870, and a part of the money paid therefor, but the certificate was not issued and received by the plaintiff until the 17th of June, and the plaintiff paid for the one hundred and sixty shares of fifty dollars each the sum of four thousand dollars. The certificate recites that "William C. Smock is the owner of one hundred and sixty shares of the capital stock of the Water Works Company of Indianapolis, paid in full of the value of fifty dollars per share."

The preliminary negotiations for the purchase of the stock were made through Daniel Macauley, who called on Mr. Smock and said he could procure him some stock. Mr. Smock gave Macauley a check for Mr. Woodruff for a part of the money. The plaintiff saw Mr. Woodruff at the office of the Water Works Company, for the first time, when he received the certificate from him. He then asked Mr. Woodruff some questions about the company, and he showed the plaintiff a map containing the proposed lines of pipes, and told what had been done, and how much was proposed to be done in a given time. The plaintiff asked where the funds were to come from, and was informed by Mr. Woodruff that \$100,000 had been borrowed to put down mains. The plaintiff says he had no conversation with Woodruff, or any of the defendants, with reference to the manner in which the stock was paid. He was not a stockholder in the Canal Company, and did not know for some months after the pur-

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chase of stock that the canal was conveyed, and was a part of the stock of the Water Works Company. No part of the money paid by the plaintiff for the stock passed to the Water Works Company. The canal, at the time of the conveyance to the Water Works Company, was worth nothing as an investment. With its incumbrances of leases, etc., it was without value in the market. For a series of years prior to that time, the expenses of keeping it up exceeded the income from water rents. It was incumbered with leases of water power. On what is called the upper level, in the city, the leases of power greatly exceeded the capacity of the canal for a large portion of each year. When there is a supply of water on the upper level, there is a surplus sufficient for some four and one-half run of stone on the lower level. The water works are located on the lower level, and have been using the water there, and the surplus of four and one-half run is sufficient to supply the ordinary demand in running the pumps, but not sufficient for fire purposes. The water rents for 1870 amounted to near ten thousand dollars. If the Water Works Company use water power equal to three run of stone, there would be a saving of nine or ten thousand dollars in running a whole year by using water instead of steam. If they could not rely upon it in case of fires, or the supply of water should at times be short, the difference would be lessened, and as the company in such case would be compelled to keep her engines in order, and have an engineer at hand, the difference would be reduced by such expenses. The water power afforded by the canal is uncertain, owing to the rise and fall of water in the river, and the liability to breaks in the canal and dam. Great expense has often been incurred on account of breaks. From the great difference in the expense of running machinery by water power and by steam, and the value of the water rents, the evidence shows that the canal is not entirely without value to the Water Works Company. As

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an investment by itself, for the purpose of profit, it is without value; but for the purpose of propelling machinery, it may be used with profit by the Water Works Company. The defendants had full knowledge of the value of the canal at the time the contract was made, the deed accepted, and the stock issued therefor. Other matters in evidence will be considered in connection with the legal rights of the parties involved in the case.

The first question presented by the plaintiff in argument, and in the brief furnished the Court, is that of over-issue of stock, as presented in the fourth paragraph of the complaint. It is claimed that as certificate No. 1, for stock to the amount \$250,000, was issued to Harmon Woodruff, the President of the Canal Company, and was by him assigned to the various stockholders of the Canal Company, on the 13th day of June, 1870, that this vested in them the stock, and "it could not be divested without the consent of such owners, and the issue of new certificates to other parties than the owners, or their assignees, would be an over issue; it would not change the vested ownership of the stock already allotted and owned; it would confer no rights on the party to whom it was issued, etc."

It is true that the stock issued to the plaintiff was a part of the stock shown to have been assigned to the stockholders in the Canal Company, and no assignment from any of the stockholders to the plaintiff is shown to have been made; but as it is shown that certificate No. 1, after the assignment to the stockholders of the Canal Company, was surrendered to the Water Works Company on the 17th day of June, before the shares were issued to the plaintiff, in the absence of any proof to the contrary, it will be presumed that it was surrendered with the assent of those to whom it had been assigned, and in whom it was then vested.

But it is urged that it was only returned to have the stock transferred on the books of the company to the owners—that is, to the stockholders in the Canal Company.

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The evidence shows that after the certificate No. 1 was surrendered, other certificates in lieu thereof were issued by the Water Works Company, in amount equal to, and no more, than the amount of shares in the surrendered certificate, and among the certificates so issued was the certificate No. 25 to the plaintiff, and the plaintiff was not a stockholder in the Canal Company. It is not shown, however, that any stockholder of the Canal Company has ever claimed the shares issued to the plaintiff, or that they were wrongfully issued to him, and as a transfer of shares, without assignment upon the books of the company, is good between the parties, it seems to me that it may well be inferred that some stockholder in the canal made a transfer of his shares to the plaintiff. The provision requiring a transfer of stock on the books of a corporation, is for the benefit of the corporation; but if the corporation assent to a transfer otherwise than on the books, and by such transfer persons to whom stock is transferred become stockholders, the corporation can not object, nor can the stockholder so long as he is really *de facto* a stockholder. *Conant et al v. Reed et al*, 1 Ohio St., 298; *Mandelbaum v. North American Mining Company*, 4 Mich., 465; *Bargate v. Shortridge*, 31 E. L. & Eq., 44.

It does not appear that the plaintiff has ever been denied any privileges as a stockholder, or that there has ever been, at any time, certificates of shares outstanding to an amount greater than the authorized capital stock, and it being shown in evidence that the shares issued to the plaintiff were issued in lieu of a certificate for shares surrendered, the evidence does not support the charge of an over-issue of stock.

Under the second paragraph of the complaint, it is urged that the deed from the Indiana Central Canal Company to the Water Works Company was void, and conferred on the Water Works Company no rights, and hence there was no consideration for the stock issued.

It is true that if the directors of a corporation expend the

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capital stock, or the assets of a corporation, in the purchase of property which those of whom they purchase have no right to convey, and can not legally convey, and do not convey so as to vest any property in the purchasers, the stockholders, those who own the stock and assets of the corporation, would be damaged by such transaction, and an action would lie against the directors for their act, by which the assets of the corporation had been wrongfully squandered and lost to the stockholders.

The acts of a corporation in violation of its charter are not, however, in all instances necessarily void. A corporation may by such acts sometimes acquire title to property, and transmit it to others. *Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co.*, 17 Wis., 372; *Bissell v. Michigan Southern R. R. Co.*, 22 N. Y., 258; *Parish v. Wheeler*, Ib., 494.

To determine the power of the Canal Company to convey the canal and franchise of the Water Works Company would require a careful investigation, which I do not deem necessary to enter upon in this case. The stockholders in the Canal Company seem to have acquiesced in the bargain made by their agents and officers, and accepted the pay for the canal. They can not, therefore, complain. They have got all they bargained for, and with a knowledge of the facts, ratified the sale by voluntarily accepting the proceeds. We are not apprised that any complaint is made, or proceedings threatened on behalf of the public, that conferred on the Canal Company the privileges, or franchises possessed by the company. It is not shown but that the Water Works Company got all that was attempted or proposed to be conveyed by the Canal Company; but on the contrary it is shown that the Water Works Company is using the water power derived from the use of the canal, and for aught that appears she is in undisturbed possession under a claim of title and ownership. Again, the bargain was made, the con-

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veyance of the canal accepted, and the stock issued according to the agreement, before the plaintiff became a stockholder; hence he was not injured by the transaction, not having any interest in the Water Works Company at the time of the transaction that could be injured. Whether the transaction was so tainted with fraud as to give him a right of action will presently be considered. For these reasons, I conclude that it is not necessary further to inquire whether the Canal Company had a right to convey the canal or not, but for the purposes of this case, as far as it affects the rights of the plaintiff, we must consider the conveyance as having passed the canal to the Water Works Company.

We come then to consider the evidence and law in connection with the fifth paragraph of the complaint.

The act of the Legislature "to authorize the formation of companies for the construction of water works in, and for incorporated cities," (act of Regular Session 1865, p. 103,) under which the Water Works Company was organized, is extremely liberal in its provisions, but lacks some of the provisions usually contained in acts authorizing the organization of corporations of so much importance to the public. It is only necessary that any number of persons, not less than twelve, shall make and acknowledge a certificate showing the corporate name they propose to assume, the amount of capital stock, the term of existence not exceeding fifty years, the number of directors, and their names for the first year, and the name of the city where the business is to be carried on; and after causing the certificate to be filed, and recorded in the office of the recorder of the county, the persons who have signed the same, and their successors, "shall be a body politic and corporate, and by their corporate name may take, hold, and convey all such real estate as shall be necessary to carry on the operations, and effect the objects and purposes of the company, &c." The act contains no provisions requiring a certain, or any amount of stock to be taken,

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or subscribed for, before becoming a corporation, nor any provision as to how, or in what quantities, or in what manner the stock taken shall be paid in. A person proposing to purchase stock would learn nothing, therefore, of the standing of the company, or the value of its stock, by looking at the provisions of the act authorizing the organization, and seeing what must have been complied with. He must look alone to the acts of the company after its organization, to see what has been done, and what the stock is actually based upon, in order to estimate its probable value. It was not necessary, under the act, that the whole, or any amount of stock should have been taken before the organization was completed, and not being required by the act itself there is no other rule of law requiring it. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 46.

It is claimed by the plaintiff that the agreement made by the defendants with the Canal Company, and their accepting the conveyance of the canal on the terms agreed upon, issuing therefor the entire capital stock of the Water Works Company, the certificates purporting, and representing on their face that the shares are "paid in full of the value of fifty dollars per share," and thus putting them upon the market, is evidence of a fraudulent combination of the defendants to deceive purchasers of the shares, and gives the plaintiff a right of action.

I have given this branch of the case careful attention, and investigation. It is apparent from the evidence now before the Court, that if the canal possessed any value, it was very small in comparison with the amount of stock issued upon its basis. The Water Works Company doubtless could take the canal by purchase, and issue stock in payment for it, but the amount so issued to be consistent with honesty of purpose on the part of the corporation, should be reasonably proportionate to the actual value of the canal. The agreement itself under which the canal was purchased, and the

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stock issued, casts such grave suspicion upon the transaction that a court, when appealed to, would look carefully to the rights of all the parties then interested, if there were any who did not assent to it, and who might be injured by it. In fact it can hardly be claimed that it could be sustained against such parties on any principles consistent with perfect good faith.

The consideration named in the deed of conveyance, by which the canal passed to the Water Works Company, was two hundred thousand dollars. This was certainly far above any value that the canal, under any view of the plaintiff's evidence, (which is all that is before the Court, and for the purposes of this case the demurrer admits to be true,) can be found to possess. It is proper, however, in this connection to say, that the fact that the canal owned by the Water Works Company has no value, does not necessarily show that the stock in the corporation is without value. *Gifford v. Carvell*, 29 Cal., 589.

Stock to the amount of five hundred thousand dollars was issued on receiving the conveyance of the canal. Of this the stockholders in the canal received two hundred and fifty thousand dollars, and by the terms of the agreement the defendants were to receive two hundred and fifty thousand dollars, ten thousand dollars when it was first issued, and the remaining two hundred and forty thousand dollars in portions as the construction of the water works progressed. Thus one-half of the stock originally issued was, by the terms of the agreement, to come, and did come back to the defendants, who authorized its issue. It did not come back to the Water Works Company, to be cancelled, and the stock reduced to that amount, but to be appropriated by the defendants to their own use.

The evidence in the case shows, however, that the certificates of stocks issued to the defendants, Hendricks, and Henderson, are still in the possession of the officers of the company.

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It was urged for the defendants, that the obligations they assumed, in the agreement of applying the proceeds of the sale of the bonds "at the rate of ninety cents on the dollar of the nominal amount thereof to the construction, and putting in operation of water works," superintending the same, and seeing that the money was faithfully, and economically applied, is a sufficient consideration to support the transfer of the stock to them. I do not think this view can be fully sustained. There is, of course, no evidence before the Court of the value to the stockholders of the guaranty thus made by the defendants, that the mortgage bonds should net ninety cents on the dollar, the defendants would, by the terms of their agreement, have to make up the difference. The difference might amount to an important sum of money; it might be an insignificant amount, or none at all. As directors, they were under no obligations to make the guaranty, and for making it they had a right to stipulate for a compensation mutually satisfactory to the parties interested. With the exception of the guaranty, most, if not all of the obligations assumed in the agreement, would devolve on them in their character as directors and trustees of the stockholders. As such, it was their duty to see that the proceeds of the bonds were honestly, faithfully, and economically applied to the purposes of the corporation, and the interests of the stockholders carefully guarded. Directors of a corporation organized for the purpose of making money, are not usually entitled to a compensation for their ordinary services. *Angell & Ames on Corp.*, § 317.

If to be compensated, however, the pay should be reasonably proportioned to the services rendered, and the financial ability of the corporation. To take one-half of the capital stock could not be held reasonable, nor do I think even the guaranty made by the defendants makes such an amount reasonable. If the plaintiff had been an original subscriber to the stock of the company, or had owned his stock at the

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time of this transaction, there would be no question but that he would have been damaged, and for the wrongful act of the defendants, by which the value of his stock would have been lessened, or destroyed, they would have been liable.

But who was injured by this large issue of stock for which the corporation received but little value? There were no stockholders, until the stockholders in the Canal Company and the defendants became such by the issue of the stock. They were all parties to the agreement, all participated in the transaction, all agreed to the terms and basis upon which the stock issued. No one of these stockholders could complain that the others had cheated him. They all equally participated in the process, by which the actual value of the stock was placed at a very low figure, and its nominal value very high. They being the owners of all the stock, no outsider was damaged, and as long as they held the stock themselves, no one could be injured by reason of the stock being of value much under par. It is true that the plaintiff seems to have bargained for the stock before any stock was issued, but it was after the agreement with the Canal Company was made, while the agreement was being executed by the parties, and the purchase was not perfected until after all the stock had been issued, two hundred and fifty thousand dollars of it, to Woodruff, and by him assigned to the stockholders of the Canal Company, and by them surrendered for cancellation. It is claimed by the plaintiff that the agreement, and the entire transaction show a combination on the part of the defendants, to issue the stock, on the basis it was issued, thus creating a fictitious capital, and sell it in the market, as paid up stock, for a value it did not possess. There is no evidence showing that any stock had been pushed upon the market; nor do I regard such evidence as material.

Certificates of stock in an incorporated company are not negotiable instruments. They do not pass as negotiable notes, or bills of exchange. They are mere muniments of

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title, showing that the owner is entitled to participate in the dividends, and profits of the corporation, in proportion to the number of shares he owns of its capital stock. The fact that it is represented on the face of the certificate as paid up stock, shows that the shares are not liable to further calls. It can not be held to mean that the corporation has money, or property equal in value to the par value of the stock. Even if money amounting to the full face of the shares had been paid into the corporation to-day, it might be expended for something of no value to-morrow, or squandered in many ways by improvident directors and managers, and hence the statement that the stock is paid up, is not an indication that can at all be relied upon as fixing the value of the stock. It is not a material representation, and hence not one which a party has a right to rely upon. The stock in a corporation is personal property, or a chose in action, according to some authorities, and I find no authority for putting the sale of stock upon grounds differing in any essential particular from the sale of a chattel. Fraud may exist by reason of false representations made by the seller to induce a purchaser to buy, as well in the sale of shares of stock, as in the sale of a horse. If A, B, and C own a horse, they may combine to make false representations as to his qualities and value, in order to induce some one to buy. If they do so, and thus induce some one to purchase, they will be liable for the fraud. If the purchaser is not moved to make the purchase by the false representations, or if the false representations are not made at all, he can not recover, simply because there was a combination, and intention to commit the fraud. There is a large class of cases where directors, and managers of corporations have been held liable for deceit in the sale of shares. In all of them there was a combination, a purpose formed to put the shares on the market, and dispose of them for a value they did not possess. But as far as my investigations have extended, and I have examined nearly all the

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cases reported on this subject, the shares were put upon the market accompanied with false representations as to the business affairs of the corporation. False representations of the value of the property owned, the profits certainly to be realized, dividends already made, false entries upon the books of the corporation showing money, or property on hand, or false entries of subscriptions. In fact the cases present almost an endless list of means devised to deceive the public as to the value of shares. Such was the character of the case of *Cross v. Sackett*, 2 Bosw., 617, cited by the plaintiff. It is more nearly allied to the present case than any I have met with. There property was taken, and shares issued for it greatly in excess of its value. The corporation was known as the "Gold Hill Mining Company." The shares were accompanied in the market with false statements of the value of the property upon which the shares were based, as well as false statements of the dividends already earned, by reason of which statements the plaintiff had been induced to purchase stock, to his great damage. It was held that he could recover. *Bagshaw v. Seymour*, 93 Eng., C. L., 873; *Ball's case*, 22 Beav., 35; *Ayer's case*, 25 Beav., 515; *Duranty's case*, 26 Beav., 273; *Ross v. Estates Investment Co.*, L. R. 3 Eq. C., 122; *Worth's case*, 4 Drew, 529; *Gohard v. Bates*, 2 El. & Bl., 490; *Smith's case*, L. R., 2 Ch. App., 604; *Clark v. Dickson*, 6 C. B. N. S., 453; *Webster's case*, L. R., 2 Eq. Cases, 741; *Stewart's case*, L. R., 1 Ch. App., 574; *Henderson v. Lacon*, L. R., 5 Eq. Ca., 249, are English cases to the same purport, in all of which the offer of the shares for sale was accompanied with false representations.

Of American cases may be cited in the same connection, and the list might be almost indefinitely extended, are the following: *Robinson v. Smith et al*, 3 Paige, 221; *Cunningham v. Pell*, 5 Paige, 606; *Cazeaux v. Mali et al*, 25 Barb., 578; *Mayne v. Griswold*, 3 Sandf., 463; *Kimmel v. Stoner*, 18 Penn. St. R., 155; *Gifford v. Carvill*, 29 Cal., 589.

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In this case there is an entire absence of any false statement as to the amount of property held by the corporation, or the business affairs of the company. The shares bought by the plaintiff were offered in the market, and purchased by the plaintiff for fifty cents on the dollar. At the time of the purchase the plaintiff asked the President of the Company where the money was to come from that they proposed expending in laying down the pipes, and he was informed that they had borrowed \$100,000 to expend in laying down the mains. This was after the completion of the fraud, if any had been perpetrated by the directors, and the case of *Mabey v. Adams*, 3 Bosworth, 346, is directly applicable. The complaint in that case was for false statements contained in the articles of association, and misrepresentations of the value of the stock made by the defendant, by which the purchaser was induced to buy. It was held he could not recover by reason of false statements in the articles of association, and as the other causes of complaint grew out of violations on the part of the defendant, as a director, of certain provisions of the statute, by which the value of the stock was depreciated, all of which occurred prior to the purchase of the stock by the plaintiff, and it was held he could not recover, having become a purchaser after the offence was committed which depreciated the stock, and no fraudulent inducements having been held out to him to purchase.

The Court says: "The fact that the stock which he purchased is less valuable than it otherwise would have been, constitutes no loss to him, since he must be presumed in the absence of any fraudulent inducement held out to him to purchase, to have given only what the stock was worth at the time. If a man purchase a horse which has been injured in the hands of its owner, he certainly does not acquire by the purchase a right of action against the wrong-doer. Such right belongs to him who owned the horse when the wrong

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was committed, and does not pass with the horse to the purchaser. A man buys stock as he does every other kind of personal property, (under certain qualifications not necessary here to be stated,) at his own risk as to the quality."

In the same connection, I would call attention to the case of *Moffat & Curtis v. Winslow et al*, 7 Paige, 124.

In the absence, therefore, of any false representations by which the plaintiff was induced to make the purchase, after the stock had already been depreciated by the acts of the defendants, the demurrer is well taken to the evidence, and must be sustained.

NOTE.—This case was affirmed by the Court at General Term, March, 1873, without any opinion being filed.—[REPORTER]

Crane *et al.* v. Lord.

IN GENERAL TERM, 1873.

MARTIN H. CRANE ET AL., APPELLANTS V. JOHN M. LORD.

WARRANTY—*implied.*

Where a manufacturer agrees to manufacture and furnish any article for a special purpose, and it is supplied and sold for that purpose, the law implies a warranty that it is reasonably fit for that purpose.

*Taylor*s, for appellants.*Hendricks, Hord & Hendricks*, for appellee.

RAND, J.—This is a suit upon an account for a furnace put in defendant's house by plaintiffs for the purpose of heating the same.

Defendant answers in three paragraphs. The two first set up that plaintiffs expressly warranted that the furnace would sufficiently heat two halls, seven rooms and a conservatory attached to the house, and would require less fuel than the furnace already in the house; and it is alleged that the plaintiffs' furnace put into defendant's house required more fuel than the one before used, and that it would not sufficiently heat said two halls, seven rooms and conservatory, and as soon as defendant discovered that to be the case he immediately notified plaintiffs and requested them to take the furnace out. The second paragraph, in addition, avers that the furnace was worthless. The third paragraph is in effect upon an implied warrantee. It alleges that the plaintiffs were manufacturers of furnaces, and knowing that defendant wished a furnace for the special purpose of heating his house, they undertook to furnish one for that purpose, but the one furnished did not reasonably fulfill the

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purposes for which it was intended, and by reason thereof the defendant had sustained damages in the sum of \$500..

There were demurrers to each paragraph of this answer which were overruled and excepted to. No defects have been pointed out in either of them, and we discover none. If, however, the first and second are bad, the plaintiffs are not injured, because the Court trying the case expressly found there was *no express warrantee*. Issues were formed on these paragraphs, and the Court found under the third paragraph that there was an implied warrantee, and allowed defendant damages for the breach thereof.

If there was no error in this then the case must be affirmed.

Section 371, in *Story on Sales*, reads as follows:

Thirdly. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as an article of such a kind can be. * * * * * Thus, when copper sheathing was ordered for the purpose of sheathing a vessel and the sellers were to manufacture it, and it proved to be wholly worthless for such a use, it was held that, although no fraud was imputable to the vendors, yet as the vendors knew that it was to be applied to the purposes of sheathing a vessel, a warranty was implied on their part, that it was fit for such purpose."

Parsons, in his works on contracts, vol. 1st, page 448, says: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for special purposes, and not applied to those where a *special thing* is ordered, although this be intended for a special purpose."

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In the case of *Brenton v. Davis*, 8 Ind. 317, our Supreme Court has fully recognized the doctrine, that where a manufacturer undertakes to furnish a manufactured article for a particular purpose, the law implies a *warranty* that it is reasonably fit for that purpose.

In the case at the bar the evidence shows that plaintiffs were manufacturers of *furnaces*, and that the defendant wanted one suitable to heat two halls, seven rooms, and a conservatory attached thereto; that the plaintiffs first examined the house, and with a full knowledge of what defendant wanted, undertook to furnish a furnace for that purpose—that they furnished one; and that it did not reasonably fulfill that purpose.

It is true there is some conflict in the evidence on some of these points, but the Judge trying the case had the witnesses before him, and could best judge of their credibility. We cannot disturb that finding, and we may add that we concur in the conclusions he came to on the evidence.

It is contended that the last clause of the paragraph quoted from Parsons' *Supra*, "where a *special thing* is ordered, although this be intended for a special purpose, there is no *implied warranty*," is applicable to this case. We do not so understand it. If the defendant had gone to the plaintiffs and *selected one of their furnaces already manufactured*, then that principle would be applicable. But that was not the case, as we have already shown.

The judgment at Special Term is affirmed.

NOTE.—The law implies in sales of articles by the manufacturer of them that they should be of merchantable quality. *Laing v. Fidgeon*, 6 Taunt 108; *Gardner v. Gray*, 4 Camp 144, 169.

This rule is based on the manufacturer's means of knowledge, and the presumption of his actual knowledge of any defect, and is interpreted to include sales of other articles to be furnished, or which the purchaser had

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no opportunity to inspect. *Waring v. Mason*, 18 Wend. 425; *Fish v. Rosberry*, 22 Ill., 288.

Another, or second exceptional rule in law, requires that the thing sold should be reasonably fit for the purpose for which the vendor knew it was intended by the vendee, although such purpose was not named in the warranty.

This rule is now established in England, and is fully recognized in New York, and other States. *Sedgwick on Measure of Damages*, 828, n.

See, also, cases there cited, holding that the "damages, flowing beyond the bounds which limit the responsibility for any ordinary breach of warranty, include compensation for the mischief resulting from the failure of the article warranted, to answer the special purpose to which it is applied."

A furnace having been delivered and put up on the following order: "Send me your patent hopper, and apparatus to fit up my brewing copper with your smoke-consuming furnace," was found not to answer the purpose of a brewer. "*Held*," there was no implied warranty it should be fit for the purposes of a brewery, and that the defendant having defined the particular machine wanted, the plaintiff fulfilled his contract in sending it." *Chanter v. Hopkins*, 4 Meeson & Welsby's Reports, Ex. 399.

Upon all sales of personal property by one in possession, the law generally implies a warranty. See *Chitty on Contracts*, p. 447, n. 1.

A machinist selling a worthless machine for a good one, is liable whether aware of the defect or not. 1 Meigs, 155.

"In case of an executory contract to furnish an article for a certain purpose, the article may be returned within a reasonable time after it has been found not to satisfy the contract, although the contract contains no stipulation for such return." *Freeman v. Clute*, 3 Barb. 424, and in case of articles manufactured for particular purposes, an implied warranty exists that they are reasonably fit and proper for such purpose. 5 Bing. 533, S. C. 3, M. & P. 155; *Howard v. Hoag*, 23 Wendell, 350; *Moses v. Mead*, 1 Denio, 878; *Bluett v. Osbourne*, 1 Stark R. 384; 4 B. & C. 115; 1 C. & P. 184; *Chitty on Contracts*, p. 461, et seq; 2 Camp. 391; 3 Camp 226; *Beals v. Olmstead*, 24 Vermont, 114; *Gray v. Cox*, 6 Dowling, and Ryland's K. B. Reports, 200; 8 do., 220; 4 Barnwell & Cresswell Reports, 108; 5 do., 458; 1 Carrington & Payne's Reports, 184; 3 Maude & Pollock's Law of Shipping, 155; 2 Scott, (New Reports) 496; 2 Manning & Granger's Reports, 279; *Smith's Mercantile Law*, 630 and n.

If the buyer relies upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required—*Chitty on Contracts*, p. 451, and note x,—whether he is the manufacturer of the article or not. *Same*—Note 3.

The burthen of proof is on the purchaser, in all cases, to prove the breach of warranty, in reduction of the damages—to show that the quality of the

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article does not correspond with the warranty. *Dorr v. Fisher*, 1 *Cushing*, 274.

The defendant's knowledge of the defect, or bad quality of the goods, need not be proved—*Williamson & Allison*, 2 *East*, 466—and in an action for fraud in the sale, the knowledge of defect and bad quality must be brought home to the vendor. *Bartholomew v. Bushnell*, 20 *Conn.*, 271; *Vail v. Strong*, 10 *Vermont*, 457; *Kingsbury v. Taylor*, 29 *Maine*, 508. See, also, 18 *Wendell*, 449.

The rule of damages for not furnishing manufactured articles according to contract, is the difference in value between those actually furnished and such as should have been, unless they were to have been furnished for a particular use. 18 *Gray*, 429. See 27 *Vermont*, 227—282; 9 *Wend.*, 20; 9 *Cush.*, 89.

A purchaser, when sued for price of goods, may set up breach of warranty as a defense, by way of recompense, or counter claim, yet he is not bound to do so. He may, after recovery of a judgment for the price, bring an action against the vendor for the price. *Barth v. Burt*, 48 *Barb.* [REPORTER.

 IN GENERAL TERM, 1873.

SOPHIA KIRTZ v. ROBERT SPAUGH ET AL., Appellants.

PRACTICE—

SURETY—

WITNESS—

Sustaining a demurrer to a paragraph of answer is not available as error, if the same facts are set up in another paragraph, upon which issue is joined and the cause tried.

A plaintiff is not compelled by the provisions of Section 41 of the code, to take a several judgement against one of the defendants before the rights of all are tried.

In a suit upon a joint and several promise, while a defendant, who claims to be a surety of the other defendant, is resisting a recovery by setting up

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defenses going to the merits of the whole case, he cannot complain because the proceeding is not more diligently prosecuted against his co-defendant.

Where a witness is called to prove facts supposed to be favorable to the party calling him, and the witness having testified that they did not exist, the party calling him cannot then introduce testimony to show that the witness had previously made statements tending to show that the facts did exist. The party calling such witness is not precluded from calling other witnesses to prove that such facts do exist.

E. T. Johnson, for appellants.

Mitchel & Ketcham, for appellee.

BLAIR, J.—This is a suit by Sophia Kirtz against Robert Spaugh, and Charles S. Boynton, on a promissory note, made by the defendants to the plaintiff, dated January 12, 1870, due one day after date.

The defendant Spaugh suffered a default. Defendant Boynton filed an answer in eight paragraphs.

The first was a general denial. The second, payment by his co-defendant, Spaugh. Third, that he (Boynton) executed the note without any consideration. Fourth, that the consideration of the note moved entirely to his co-defendant, Spaugh, and he signed it only as surety for Spaugh, as was well known to the plaintiff, and that afterwards, on the first day of January, 1871, the defendant Spaugh paid the plaintiff \$31, being the interest in full to that date, and the plaintiff then agreed to, and with the defendant Spaugh, without the knowledge, or consent of the defendant Boynton, in consideration of Spaugh agreeing to pay the plaintiff ten per cent. interest on the note for the next six months, and pay the principal at the end of that period, that he would extend the time of payment for six months, to wit: until the first day of July, 1871. The fifth sets up a similar extension of time from the first day of July, 1871. The sixth sets up a verbal notice to the plaintiff to proceed to collect the note

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and a parol promise of the plaintiff to release the defendant Boynton in consideration that Spaugh had agreed to pay large interest on the note, and that the plaintiff had agreed to, and had extended the time of payment of said note, and also in consideration that Boynton would not compel the plaintiff to sue Spaugh.

To this last paragraph a demurrer was sustained by the Court, and the proper exception entered by the defendant

In the first place the notice to sue being only verbal, did not place the plaintiff under any obligation to institute suit on the note, (2 G. & H. p. 306. See 672) and hence the defendant Boynton yielded no right he had acquired to have suit brought, nor the plaintiff any obligation she was under to bring suit against Spaugh, and therefore this did not make any consideration for the release claimed. The other allegations being merely general in their terms, that Spaugh had agreed to pay "large interest" on the note, and that the plaintiff had extended the time of payment of the note, without setting up any valid agreement by which the time had been extended, furnish no consideration to support the plea, and the action of the Court in sustaining the demurrer was therefore right.

A seventh paragraph of answer alleges a notice in writing, after the maturity of the note, requiring the plaintiff to institute a suit on the note, and avers that the plaintiff neglected for an unreasonable time to institute any suit, &c.

No question is raised in connection with the eighth paragraph of answer.

Issues were then joined upon the different paragraphs of answer, after which, on the 18th of March, 1872, a supplemental answer was filed by the defendant, alleging notice in writing, given the plaintiff in December, 1871, to forthwith institute an action against Spaugh, and charging that if the plaintiff had diligently pursued her remedy the debt could

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have been made off Spaugh, but that the plaintiff neglected to bring such suit until the 13th day of January, 1872, when suit was instituted, and the defendants Spaugh and Boynton each served with process more than ten days before the first day of the February term of this Court, and on the second day of said term of Court, the defendant Spaugh was called, and defaulted, since which time to the 13th day of March, 1872, no further proceedings have been taken against said Spaugh, wherefore the defendant claims he is discharged, &c.

A motion of the plaintiff to strike out that part of the supplemental answer that alleged the taking of the default against the defendant Spaugh, and a failure of the plaintiff to proceed against him, was sustained by the Court. A demurrer was then sustained to the remaining portion of the answer.

These rulings are assigned as errors. There was no error of which the defendant can complain in sustaining the demurrer, after the motion to strike out had been sustained, for the answer was then the same as the seventh paragraph upon which issue had already been joined, and upon which the question arising upon the notice to sue was tried.

Was there any error in striking out that part of the answer that alleged a failure to proceed to judgment against Spaugh after he had made default?

We think not. On the same day that Spaugh was defaulted, the defendant Boynton appeared, and was ruled to answer. On the next day he filed an answer in eight paragraphs presenting defenses in almost every conceivable shape, one a general denial, which was not withdrawn until after the filing of the supplemental answer, and another that the note had been fully paid by Spaugh.

The argument of the defendant proceeds upon the theory that the note being joint and several, the plaintiff was com-

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pelled, by virtue of the notice, immediately upon the default of Spaugh, to proceed to judgment against him. The third clause of section forty-one, 2 G.& H. page 66, urged upon our attention by the defendant as supporting his position, reads as follows: "If all the defendants have been served, judgment may be taken against any, or either of them severally when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone."

The entire context of the section of which the above is a part, shows that its provisions are for the benefit of plaintiffs, and gives them privileges which they may or may not avail themselves of, and we do not think that even in a case where the rights of other parties may be affected, a plaintiff can be compelled to proceed to take a several judgment against one of the defendants before the rights of all are tried. If the note had been paid by Spaugh as solemnly alleged by Boynton in his answer, good faith to all the parties would seem to indicate that the issue should be tried before proceeding to judgment against Spaugh, for although, under the laws, the default of Spaugh admitted the indebtedness against him, yet if it should turn out in proof that the debt had been paid by him, judgment ought not to be given against him. The plaintiff was not compelled to proceed to present her proof, and case until the whole of it could be presented at once, and while the defendant was resisting a recovery by the plaintiff by setting up and urging defenses going to the merits of the whole case, it does not lie in him to complain because the same proceeding was not more diligently prosecuted against his co-defendant.

The overruling of a motion for a new trial is also assigned for error.

A great many reasons are set out in the motion, but as the greater portion of them are without force, we will only

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have been made off Spaugh, but that the plaintiff neglected to bring such suit until the 13th day of January, 1872, when suit was instituted, and the defendants Spaugh and Boynton each served with process more than ten days before the first day of the February term of this Court, and on the second day of said term of Court, the defendant Spaugh was called, and defaulted, since which time to the 13th day of March, 1872, no further proceedings have been taken against said Spaugh, wherefore the defendant claims he is discharged, &c.

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The overruling of a motion for a new trial is also assigned for error.

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notice those embraced in the assignment of errors, and discussed in the brief of counsel.

The bill of exceptions contains some ten or twelve pages of matter, setting out an offer to prove statements made on a former trial of the cause by the plaintiff, when testifying as a witness.

The first offer was made before the plaintiff was present at the trial, but afterwards, her presence having been procured, the Court, at the request of the defendant, having given time to bring her in, she was examined as a witness for the defendant Boynton.

The bill of exceptions does not state clearly by whom the plaintiff was introduced as a witness on the former trial. If introduced by the defendant Boynton then it was clearly incompetent for him to prove on the last trial what she, as his own witness, had testified to on the former trial. In the absence of any showing to the contrary, we must presume in favor of the ruling of the Court, that the plaintiff was introduced and testified as a witness for the defendant on the former trial. On the trial the plaintiff says, as her evidence in the bill of exceptions shows, that she was examined as a witness for defendant Boynton on the former trial.

After the plaintiff was introduced by, and examined as a witness for the defendant, the offer was again renewed and a series of questions propounded to the plaintiff. These were for the purpose of discrediting her testimony by showing that at the former trial the witness had made other, and different statements.

The plaintiff seems to have been called as a witness by the defendant to prove that an agreement had been made between the plaintiff, and the defendant Spough to extend the time of payment of the note in suit.

Whether we regard the proof offered as tending to contradict, or impeach the witness, or as admissions made by

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the plaintiff, we think the ruling of the Court was right. The introduction of admissions in testimony must be without violating any rules of evidence which apply when a party is constituted a witness. *Carter v. Buckner*, 3 *Blackf.* 314; *Carter v. Edwards*, 16 *Ind.* 238.

It is urged on behalf of the defendant that a party may in the language of the statute, always contradict his own witness, "by showing that he has made statements different from his present testimony."

The witness having been called to prove certain facts supposed to be favorable to the party calling her, and the witness having testified that they did not exist; it has been held under a statute almost identical with ours, that the case does not fall within the reason or policy of the rule which will allow the witness to be contradicted by evidence, that she had previously made statements agreeing with the proof desired to be made by the party calling her. *Camp v. The Commonwealth*, 2 *Met. (Ken.)*, 17; *McVey v. Blair*, 7 *Ind.* 590.

The party calling such witness is not precluded from calling other witnesses to prove that such facts do exist. 1 *Greenleaf on Evidence*, (12 *Ed.*) p. 491, §444 a, and authorities there cited.

The whole case seems to show an attempt on the part of the defendant to make out his entire defense by proof of testimony introduced by himself on a former trial.

We have examined the evidence, and think it fully supports the finding and judgment, and cannot believe that the evidence offered could in any event have changed the result, even if it had been admitted.

The judgment is affirmed.

NOTE.—A surety will not be discharged by mere forbearance—*Goring v. Edwards*, 6 *Bing.* 94; 5 *Bing. N. P.* 728,—unless there be some stipulation in

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the truth of any particular fact by any other competent testimony in direct contradiction to what his own witness might have testified, but whether he can prove that the witness had previously stated the facts in different manner is, according to Greenleaf, (1 Sec. 444) a question upon which there exists some diversity of opinion."

"What a witness hath been heard to say, at any time, may be given in evidence, in order either to invalidate or confirm the testimony which he gives in Court."—*Hawkins* 2, Ch. 46, Sec. 14— but this has not always been allowed to a party in relation to his own witness. See 1 *Greenleaf on Ev.*, Sec. 442, *et seq.*, and notes thereto. Also, in the case of *Commonwealth v. Welch*, 4 Gray, 585, 587; *Holbrook v. Mix*, 1 Ed., Smith, 154; *Alexander v. Gibson*, 2 Camp., 555; *Lawrence v. Barker*, 5 Wend., 305; *Bradley v. Riccardo*, 8 Bing., 57; *Jackson v. Leek*, 12 Wend., 105; *Spencer v. White*, 1 Fredell, R. 239; *Hall v. Haughton*, 37 Maine, 411; *Leavy v. Dearborn*, 19 N. H., 351.

In a recent English case, it was held, that if a witness unexpectedly gives evidence adverse to the party calling him, the party may ask him if he has not, on a particular occasion, made a contrary statement, and the question and answer may go to the jury with the rest of the evidence; the Judge cautioning them not to infer from the question alone that the fact suggested in it is true. See *Melhuish v. Collier*, 15 Ad. & El., 378; N. S.—[REPORTER.

IN GENERAL TERM, 1873.

LEWIS W. HASSELMAN AND ORAMEL F. WATSON, Appellants,
v. SIMON YANDES, JAMES H. MCKERNAN AND
WINSLOW S. PIERCE.

RECORD—*relation of assignee to—*

LIEN—*holder of, with what chargeable—*

PARTIES—*to proceedings of foreclosure—*

ASSIGNEE—*known and unknown to record.*

Hasselman and Watson v. Yandes, McKernan and Pierce.

A party holding a secret, or unknown lien, or the unknown assignee of a known lien on mortgaged property, is chargeable with such diligence as will bring home notice of his lien to the holder of the older mortgage, and a purchaser under a senior mortgage will not be effected by such lien.

The rule that all junior incumbrancers must be made parties to the proceedings of foreclosure, or their rights to redeem will not be barred, extends to such incumbrancers as are shown of record, or of which the party seeking a foreclosure has notice.

The assignee of a junior mortgage cannot redeem from a purchaser under a senior mortgage, who has had no notice of such assignment, nor is such purchaser effected by the fact that such unknown assignee was not made a party to the proceedings of foreclosure, for the purchaser is chargeable only with notice of what may be shown of record.

Porter, Harrison & Hines, for appellants.

RAND, J.—This was a suit in which the plaintiffs seek, as holders of a junior mortgage, to redeem certain real estate in the complaint described, which is held by defendants under a Sheriff's deed, by foreclosure, and sale of the real estate under an older mortgage. The Court at Special Term sustained a demurrer to the complaint, and rendered judgment for defendants, and plaintiffs have prosecuted this appeal and seek a reversal of the judgment.

The complaint states that one Matthew B. Tilberry was, on the 21st day of January, 1866, the owner of the real estate in controversy, and on that day he mortgaged it to the defendants Yandes, McKernan and Pierce, to secure a debt to them. Afterwards Tilberry conveyed said real estate, and by several *mesne* conveyances, the title was on the 23d day of March, 1867, vested in one Henry Weber, and on that day he mortgaged it to one Thomas Brooker to secure several notes he owed him; that on the 15th day of April, 1867, said Brooker endorsed said notes and mortgage to plaintiffs, and that they ever since have been the owners thereof; that afterwards, to wit: on the 6th day of May, 1868, said Yandes, McKernan and Pierce, instituted a suit

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in the Marion Common Pleas Court against Matthew B. Tilberry and Caroline Tilberry, his wife; Henry Weber and Thomas Brooker, seeking to foreclose their said mortgage, and such proceedings were had therein, that a decree of foreclosure and sale was rendered, and afterwards, to wit: on the 18th of June, 1869, the Sheriff of Marion County sold said real estate under said decree, and said Yandes, McKernan and Pierce became the purchasers thereof for the amount of their debt, and have received a Sheriff's deed for said real estate. It is further stated that these plaintiffs were not made parties to said suit, and had no notice of it.

It is further alleged that plaintiffs foreclosed the mortgage endorsed to them by Brooker, but that they did not make Yandes, McKernan and Pierce, parties, because they were *senior* incumbrancers and not necessary parties; and that said real estate was sold by the Sheriff under this decree, and they purchased the same in satisfaction of their said mortgage debt, and that they now hold this Sheriff's deed therefor; that they tendered to defendants the amount of their mortgage, interest and costs, and demanded a redemption of said real estate from said Sheriff's sale under Yandes, McKernan and Pierce mortgage and decree, but that said Yandes, McKernan and Pierce denied the plaintiffs' right to redeem, and therefore plaintiffs institute this suit and bring the money tendered into Court, and pray that they be permitted to redeem, &c.

Copies of the notes and mortgage are made part of the complaint, but they do not show that they have been endorsed or assigned. There is no allegation in the complaint that the mortgage was assigned on the record in the Recorder's office, or that the defendants were notified that the plaintiffs were the holders of the notes and mortgage.

We have statutes authorizing the recording of mortgages and when recorded they are notice to all parties interested.

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We have no statute authorizing the recording of the assignment of mortgages, and if recorded, that it shall be notice to all interested parties.

We have a statute which says: "The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them to the mortgagee, or any assignee, before actual notice of such assignment. 2 G. & H., 356.

The question presented by the record is, can the assignee of a junior mortgage, *redeem* from the purchaser at Sheriff's sale, under a decree of foreclosure of an older mortgage, when said junior mortgage has been assigned before the institution of the suit to foreclose the older mortgage, and said assignee was not made a party, and when there was no assignment of record, and the holder of the senior had no notice of the assignment of the junior mortgage; and where the junior mortgagor himself was made a party thereto?

It is a general rule that all junior incumbrancers must be made parties to the proceedings of foreclosure, or their rights to redeem will not be barred.

But we apprehend that this rule extends to such incumbrances as are shown of record, or of which the party, seeking a foreclosure, has notice.

There is another general rule that purchasers, without notice, shall not be affected by a secret or unknown lien.

We have been referred to the cases of *Godfrey v. Chadwell*, 2 *Vernon*, 601, and *Mount v. Weston*, *same*, 663, as establishing the doctrine that a junior incumbrancer may redeem from a foreclosure of a prior mortgage, if not made party, although the party foreclosing had no notice of such junior incumbrance.

In England at that time there were no registry laws, and a foreclosure there was not followed by a sale to pay the

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mortgaged debt, but the party took the whole estate mortgaged in satisfaction of the mortgage debt. *Cases would doubtless frequently arise in which a valuable estate would be sacrificed in payment of a debt much less than the true value of the estate*, and Courts there have extended the rights to redeem to its utmost limits.

We have also been referred to the case of *Swift v. Edson*, 5 Conn., 531. We find that in Connecticut a foreclosure of the mortgage gives the estate to the mortgagee. Indeed the practice has always been very liberal in opening decrees of foreclosure when such foreclosure vests the estate in the mortgagee without sale.

In this State, in all foreclosures, the property mortgaged must be sold by the Sheriff to satisfy the mortgage debt, and if such sales were liable to be redeemed by a party holding some secret or unknown lien, it would have a serious tendency to impair the value of mortgage securities, and seriously injure the mortgagor and mortgagee, as property would not sell for its value if liable to be redeemed by parties holding secret liens.

Our own Supreme Court seem to have taken this view in the case of *Harlock v. Barnhizer*, 30 Ind., 370.

In this case Harlock held a *junior unrecorded* mortgage at the time Barnhizer instituted his suit to foreclose his *senior* mortgage, but had *no notice* of Harlock's *unrecorded junior* mortgage. During the pendency of the foreclosure suit, Harlock took a *second* mortgage on the mortgaged premises. After the sale of the mortgaged premises under the decree of foreclosure of the senior mortgage, Harlock brings his suit asking to be permitted to redeem a *junior incumbrance*. (Rep.) The Supreme Court say that he has no right to redeem under his *second* mortgage, *because* he was as *lis-pendens* purchaser, and is bound by the decree. As to his *first* mortgage the Court say, "the rights of the purchaser of the mort-

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gaged premises, under the decree, could not be affected by the unrecorded mortgage of which he had no notice."

It would appear that it was Harlock's own neglect in not putting his mortgage on record as authorized by the statute.

In the case at bar we have seen that there is no law authorizing the recording of assignment of mortgages so as to charge parties interested in the mortgaged premises with notice, and it is urged that the rule in *Harlock vs. Barnhizer supra*, does not apply, because there is no way in which constructive notice can be given that plaintiffs were the holders of the junior notes and mortgages.

We think the rule does apply in this case, and the difficulty is in the defective nature of the security the plaintiffs have taken, instead of the rule.

The plaintiffs knew that defendants had a senior mortgage, and defendants knew that Brooker held a junior one, but did not know that plaintiffs held it by assignment. Plaintiffs must have known that they would not be made parties to a suit to foreclose the *senior* mortgage, unless the holder was notified that they held the junior mortgage.

One party or the other has to be charged with some diligence. The holder of the senior mortgage is charged with notice of what may be shown of record, but we think beyond that he is not properly chargeable except by actual notice.

If he makes the party of record a party to his suit of foreclosure, he has done all he ought to be required to do, unless he has notice.

The party holding a secret or unknown lien, or the unknown assignee of a known lien on mortgaged property, ought to be chargeable with such diligence as will bring home notice of his lien to the holder of the older mortgage.

We think the ruling at Special Term was right, and the judgment is affirmed.

Clawson v. Shortridge et al.

IN GENERAL TERM, 1873.

JOSIAH CLAWSON v. AMBROSE F. SHORTRIDGE, ET AL.,
Appellants.

DEPOSITIONS—*notice in.*

A notice to take depositions requires only that reasonable precision, to inform the opposite party of the time when, and place where to be taken.

A notice, therefore, to take depositions at a designated office, is sufficiently certain if, by usage it had come to signify the room that had been occupied by a firm as an office, though it was not then used as the office of the parties named in the notice; especially is such notice good if they occupied no other room, jointly, as an office.

Young—G. & L., for appellants.

Dye & Harris, for appellee.

PERKINS, J.—Josiah Clawson sued Ambrose Shortridge and others, on account. Trial, finding for plaintiff. Motion for new trial overruled, and judgment on the finding. The defendants appeal to General Term and assign errors, the first of which is, the overruling of a motion to suppress two of plaintiff's depositions.

The motion to suppress was based on the assumed fact that the notice of taking the depositions, specified a fictitious place at which it alleged they would be taken. The notice was given on the 1st day of June, 1872, and as to time and place of taking, was as follows: "The defendants in the above entitled cause are hereby notified that on the 4th day of June, 1872, at the law office of Knight &

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Stone, in Brazil, in the County of Clay and State of Indiana, between the hours of 8 o'clock A. M., and 6 o'clock P. M., of said day, before some officer authorized to take depositions, the plaintiff will proceed," &c.

The certificate of the officer to the depositions taken is as follows: "I, Isaac M. Compton, a Notary Public in and for the County of Clay, State of Indiana, do hereby certify that, etc., and that said depositions were taken at the former office of Knight & Stone, now the office of G. A. Knight, in Brazil, Clay county, Indiana, on the 4th day of June, 1872, between the hours of 8 o'clock A. M. and 6 o'clock P. M., of said day, in pursuance, in all respects, to the within and annexed notice."

The affidavit on which the motion to suppress was based, reads thus:

"John Young, being duly sworn, says that he attended as attorney for defendants Shortridge and Brown, on the 4th day of June, at Brazil, pursuant to notice; that there was no such office in Brazil as the office of Knight & Stone; that Stone's office was shut up, and Mr. Stone gone to the country; that at Mr. Knight's office deponent was informed by the clerk in waiting that the depositions were to be taken at the office of Mr. Curtis, attorney, on account of Mr. Knight's absence; that Knight was absent; that deponent waited at the office of Mr. Curtis till 2½ o'clock P. M., and no parties appeared during that time, and deponent then returned home, believing that no depositions would, or could be taken on that day.

The object of notice of taking depositions is, that the opposite party may appear at the taking, if he desire to do so, and it should inform him, with reasonable precision, of the time and place.

In this case the time is sufficiently certain; the question is as to the place.

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The place was the office of Knight & Stone. The term, office of Knight & Stone, signified a room occupied by those gentlemen; but by usage it might come to signify the room that had been occupied by them as an office, after they had ceased to so occupy it, especially if they occupied no other room jointly as an office. Such seems to have been the fact in this case; and the notice thus designating that room, the depositions could be taken nowhere else under the notice given, without the consent of the opposite party. The clerk of Mr. Knight, as such, had nothing to do with the matter. The room was not a fiction. The affidavit shows that as a fact the notice did enable the opposite party, in due-time, to find the room designated as the office of Knight & Stone, where the depositions were to be, and were in fact taken, within the hours specified. This establishes, as matter of fact, that the notice proved sufficient, and this being so, removes all ground for the motion to suppress in this case, however it might have been, had the fact been otherwise.

All the other errors complained of depended on the question of error in overruling the motion to suppress the depositions. That motion having been rightly overruled, the depositions were correctly admitted in evidence, and being in evidence, they, with the other testimony, tended to prove the plaintiff's case; and the jury, or Court, sitting as such, having found for the plaintiff, the judgment is affirmed.

Hillman v. Stumph et al.

IN GENERAL TERM. 1873.

LEVI C. HILLMAN, Appellant, v. JOHN STUMPH, ET AL.

MORTGAGE—*assignment of—*

MORTGAGOR—*rights of—on record—*

RECORD—*satisfaction of mortgage.*

Mortgagors have the right to insist that an entry of satisfaction of their mortgage be made on the records in the Recorder's office upon tendering payment in full, or upon furnishing sufficient evidence of the cancellation of the mortgage, and where the record does not show that the interest of the mortgagee has been, by assignment, acquired by an assignee, a tender of the amount due to the mortgagee is good, and in suit for a judicial satisfaction the mortgagors are entitled to costs against the assignee, which were occasioned by his own negligence in not providing himself with authority to satisfy the mortgage record on payment of the debt.

Adams, Dye & Harris, for appellants.

NEWCOMB, J.—Stumph and Lefever executed three promissory notes, payable at different periods, and a mortgage on real estate to secure the same, to one Gilbert. The mortgage was duly recorded, after which the note last payable was assigned by Gilbert to one Jesse Jones, and by the latter to the plaintiff. The mortgage was never assigned by Gilbert. The notes were all paid except the last. When that became due, Stumph, one of the mortgagors, offered and was ready to pay it to Jesse Jones, plaintiff's attorney in fact, but demanded of the latter that on payment being made the mortgage should be satisfied of record, and refused

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to pay unless such satisfaction were entered at the time of payment. Thereupon the plaintiff commenced a suit for judgment on the note, and a foreclosure of the mortgage. On entering their appearance Stumph and Lefever answered, setting up the prior tender, coupled with the demand for record satisfaction of the mortgage, and brought the principal and interest due into Court, to be paid to plaintiff on satisfaction of the mortgage being entered of record. The Court thereupon rendered judgment of foreclosure, directed the money paid in by defendants to be applied, first to the discharge of the costs made in the cause, and ordered the residue to be paid to plaintiff, and that satisfaction of the mortgage should be entered on the margin of the record thereof, by the Clerk, and that he should enter satisfaction of the judgment.

The facts and conclusions of law therein, were set out in a special finding by the Court, and the plaintiff duly excepted to the conclusion of law found by the Court, that costs should be taxed against the plaintiff. This presents the only question in the case.

The following statutory provisions concerning the satisfaction of recorded mortgages, are found in "An Act concerning mortgages," 2 G. & H. 355, Sec. 5. "Every mortgagee of lands whose mortgage has been recorded, having received full payment of the sum or sums of money therein specified, from the mortgagor, shall, at the request of such mortgagor, enter satisfaction on the margin, or other proper place in the record of such mortgage, which shall operate as a complete discharge thereof."

"Sec. VI. Where such mortgage has been paid and satisfied by the mortgagor, he may take a certificate thereof, duly acknowledged by the mortgagee, or his lawful agent, as herein required for the acknowledgment of conveyances to entitle the same to be recorded; which certificate and acknowledg-

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ment shall be recorded by the Recorder in whose office such mortgage is recorded, with a reference to the book and page containing the record of the mortgage aforesaid; and such recorded certificate shall forever discharge and release the mortgagor from such mortgage, and forever bar all suits and actions thereon."

By Section I, of the act of March 9, 1861, 2 G. & H., 294, it is provided, "that upon the foreclosure of any mortgage," etc., "and upon the payment and satisfaction of such judgment as may be rendered in such proceeding in foreclosure, in said Court, the Clerk thereof shall immediately thereafter enter satisfaction of said mortgage, on the records of the Recorder's office of such county, if the same shall have been recorded; *Provided*, that the record in foreclosure, and satisfaction thereof, shall show that the whole debt secured by such mortgage has been paid."

The assignment of the notes mentioned in the mortgage transferred an equitable interest in the mortgage itself to the assignee. *Gower v. Howe*, 20 Ind., 396; *Sample v. Rowe, et al.*, 24 Ind., 208. In the latter case it was held that where more than one obligation is secured by the mortgage, each is considered a separate mortgage, and the assignment of one or more of such obligations will carry with it so much of the mortgage. But there is no statutory provision that the assignee of an obligation secured by mortgage, may enter satisfaction on the record of such mortgage, when the record itself does not show that he has acquired an interest in the mortgage. The entry of satisfaction in such case by the assignee of a note, would not of itself, therefore, furnish sufficient evidence of the cancellation of the mortgage. The mortgagors were entitled to have such satisfaction of the mortgage entered on the record in the Recorder's office, on making full payment thereof, and we think they had a right to insist upon such entry when tendering payment.

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They ought not to be required to pay the debt and afterwards be driven to a suit to remove the record evidence of an incumbrance on their property which they had already discharged. It was no fault of theirs that the holder of the note had not provided himself with authority from the mortgagee to discharge the mortgage of record on receiving payment of the note. It would be unjust to subject the mortgagors to the costs of a foreclosure rendered necessary for the protection of their title in consequence of the neglect of the plaintiff to provide himself with authority to satisfy the mortgage record on payment of the debt secured thereby. The simple process of taking a properly acknowledged power of attorney from the mortgagee when the note was assigned, authorizing him to satisfy the record, would have obviated the difficulty. Perhaps an assignment of the mortgage, acknowledged before a proper officer, would have entitled the assignment to record, and clothed the purchaser of the note with authority to discharge the mortgage of record, but as that question does not arise, we decide nothing in reference to it. The facts set out in the special finding, show that there were but two methods by which record evidence of satisfaction of the mortgage could be obtained; one by payment of the note and a subsequent suit against the mortgagee and his assignee to have a judicial satisfaction decreed; the other, by a foreclosure in which the Court could direct the Clerk to enter satisfaction in accordance with the provisions of the statute above quoted. In our judgment the mortgagors might properly elect the latter proceeding, and, not being themselves at fault, they were entitled to costs against the plaintiff, which were occasioned by his own negligence. The judgment at Special Term is therefore affirmed, with costs.

Kendleberger v. Vandusen.

IN GENERAL TERM, 1873.

TOBIAS KENDLEBERGER v. CHAUNCEY VANDEUSEN, Appellant.

HUSBAND—*liability of, for medical attendance on wife—*PRACTICE—*errors, assignment of.*

A husband is liable for reasonable charges for the services of a physician employed by the wife in her illness; showing such employment, and the necessity of *medical attention*, form sufficient evidence to establish liability of the husband for such employment.

Errors not assigned below, cannot be considered on appeal.

RAND, J.—This is a suit by Kendleberger against Vandusen on an account for medical services rendered by plaintiff to defendant's wife.

The case was submitted to the Court, and there was a finding and judgment for the plaintiff.

The Court overruled the following motion for a new trial.

1. The finding and judgment of the Court is not sustained by the evidence.

2. That the finding and judgment of the Court is not supported by, and is contrary to the evidence.

3. That the judgment is not sustained by the law and the evidence.

4. That the Court erred in failing to make special finding upon the defendant's request.

The three first specifications present the question of the sufficiency of the evidence to support the finding of the Court. There was conflicting evidence on some points in controversy.

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The evidence satisfactorily shows that the services charged were rendered to defendant's wife, and that she needed *medical attention*; that no other physician was at the time attending upon her, and that the wife employed plaintiff.

We are of opinion that the wife had a right to make such employment, and that the defendant is liable for the reasonable charges of plaintiff for such services as he rendered under such employment. The husband is liable for necessities furnished his wife.

See 1st, *Blackstone's Commentaries*, side page 442; *Litson v. Brown*, 26 *Ind.*, 491. *Medical bills* are necessities. See 1st, *Blackstone's Commentaries*, side page 466, and notes, authorities there cited.

The fourth specification for a new trial was properly overruled because the renewal does not show that defendant requested the Court to make a special finding, and for its failure to do so the defendant objected and excepted.

It is assigned for error that the Court erred in admitting in evidence the conversations, and statements of defendant's wife. This error, if such it is, was not assigned as a reason for a new trial, and therefore cannot be considered here. See *Kent v. Lawson*, 12 *Ind.*, 675; *Snodgrass v. Hunt*, 15 *Ind.*, 274; *Medder v. Hiatt*, 14 *Ind.*, 406; *Leach v. Webster*, present Term Superior Court.

The judgment is affirmed.

NOTE.—If the husband wrongfully deserts his wife and children, making no provision for them, he is answerable for necessities furnished them upon his credit. (*Note to Carter v. Howard*, 6 *Am. Law Reg.*, (N. S.) 411, and supported by *Walker v. Leighton*, 11 *Foster*, 111; *Evans v. Fisher*, 5 *Gill* 569; *Norton v. Fasan*, 1 *Bosanquet & Fuller's Reports*, C. P., 226; *Kimball v. Keyes*, 11 *Wend.*, 83.

Authorities cited, in the case of *Carter v. Howard*, being an action of *assumpsit* to recover pay for medical services rendered the wife wherein it was held, that a physician who renders professional services to a married woman at her request, and expressly upon her credit while she is living

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apart from her husband, cannot afterwards recover in *assumpsit* against the husband, are: 20 *Eng., L. & Eq.*, 845; *Sawyer v. Cutting*, 23 *Vt.*, 486; *Patterson v. Gandasequi*, 15 *East.*, 62; *Addison v. Same*, 4 *Taunton*, 574; 32 *Ala.*, 227; 18 *Conn.*, 417. See, also, 18 *Texas*, *Black v. Bryan*, 453; and 36 *Vt.*, 87.

Of the liability of the husband upon his wife's contracts during coverture. See *Chitty on Contracts*, 166-185.—[REPORTER.]

IN GENERAL TERM, 1873.

THOMAS HUGGINS v. SAMUEL TINSMAN AND SUSAN TINSMAN,
Appellants.

PROMISSORY NOTE—*extension of payment*—

FORECLOSURE—*attorneys fees in*—

ATTORNEYS FEES.

An agreement to forbear to sue, or to extend the time of payment of an obligation for a limited time, though founded on a sufficient consideration, cannot be pleaded as a release or bar of an action on such obligation, brought within the time limited. In such case the defendant is left to his action for a breach of the agreement.

Where an agreement to extend the time of payment of a note is stipulated for an interest thereon that is usurious, such agreement cannot be enforced, nor does it constitute a sufficient consideration unless the interest had been paid for the extension.

In a suit for foreclosure, the plaintiff is not entitled as a matter of right to recover attorney's fees on notes not due.

S. J. Peele, for appellee.

BLAIR, J.—This is an action by the plaintiff to foreclose a mortgage given to secure the payment of two promissory notes made by the defendant Samuel Tinsman to the plain-

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tiff, each for \$1,250, dated November 17th, 1870, one due in one year from date, and the other two years from date. The suit was commenced March 22, 1872.

Judgment and decree of foreclosure was rendered at Special Term for the plaintiff, from which the defendants appealed to General Term.

Errors in the action of the Court at Special Term are assigned in several particulars, but the appellants say they rely upon the question presented by the plaintiff's demurrer to the third paragraph of the defendant's answer.

In the third paragraph of answer the defendants admit the execution of the notes and mortgage, but say that on the first day of November, 1871, the plaintiff and defendant Samuel Tinsman made a verbal agreement whereby the defendant agreed to pay interest on the note first falling due at the rate of twelve per cent, per annum from the date of the note until the maturity of the second note falling due on November 17th, 1872, and in consideration of which agreement the plaintiff agreed to extend the time of payment until the 17th day of November 1872, that afterwards on the 9th of February, 1872, the defendant Samuel Tinsman, paid to the plaintiff on the interest fifty dollars, and on the 7th day of March, 1872, he paid thereon seventy dollars, wherefore Samuel Tinsman says the action has been prematurely brought, and the defendant Susan says that the above agreement was made without her knowledge and consent, and that as to her the mortgage ought not to be foreclosed.

A demurrer of the plaintiff was sustained to this answer, to which ruling the defendant excepted.

The defendant cites the case of *Rigsbee v. Bowler*, 17 Ind., 167, in support of the above paragraph of answer. It was there held that as the payee of the note sued on had agreed with the defendant, before the defendant had notice of the assignment of the note, that if the defendant would

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pay him before it become due, another debt of three hundred dollars owing from the defendant to the payee, the latter would extend the time of payment of the note sued on, the agreement constituted a good defense, the debt of three hundred dollars having been paid as agreed. The Court in that case cited *Peck v. Beckwith*, 10 *Ohio S. T. R.*, 497, as an authority, and the case seems to sustain the ruling. In deciding the case a general statement is given that a subsequent verbal agreement changing the terms of a written contract may be valid, and may be proved by parol, in a case where the original contract might have been made by parol, and beyond the support of this principle no reference is made to the numerous authorities in our State that distinctly assert the rule to be otherwise, and hold that an agreement to forbear to sue, or to extend the time of payment of an obligation for a limited time, though founded on a sufficient consideration, cannot be pleaded as a release, or in bar of an action on such obligation brought within the time limited. In such case the defendant sued is left to his action for a breach of the agreement.

Irons et al. v. Woodfill et al., 32 *Ind.*, 40; *Thalman et al. v. Barbour et al.*, 5 *Ind.*, 178; *Harbert v. Dumont et al.*, 3 *Ind.*, 346; *Clark et al. v. Snelling*, 1 *Ib.*, 382; *Lowe et al. v. Blair et al.*, 6 *Blackf.*, 282; *Mendenhall et al. v. Lenwell*, 5 *Ib.*, 125; *Berry v. Bates*, 2 *Ib.*, 118; *Reed v. Shaw*, 1 *Ib.*, 245. See, also, *Thinblely v. Barron*. 3 *M. & W.*, 210; 2 *Saunders*, 48, note 1; *Chandler v. Herrick*, 19 *John.*, 129.

In view of these authorities, the first referred to being a later case than the one in 17 *Ind.*, we cannot follow the rule announced in 17 *Ind.*, and must hold that there was no error in sustaining the demurrer to the third paragraph of answer. In addition to the above, the answer does not show that the interest agreed to be paid, was paid, except a portion of it, and further, the alleged agreement was to pay *usurius inter-*

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est, hence was an agreement that could not have been enforced, and did not constitute a sufficient consideration for the extension unless the interest had been paid. See on this point, *Shaw et al. v. Binkard*, 10 Ind., 227; *Goodhue v. Palmer*, 13 Ind., 457; *Beauchamp v. Leagan*, 14 Ind., 401.

We think, in a suit for foreclosure, the plaintiff is not entitled as a matter of right to recover attorney's fees on notes not due, providing for such fees.

The recovery on such notes follows as an incident to a recovery upon amounts due, and the notes not due do not constitute the cause of action, and a payment of the amount due, even after judgment and before sale, relieves the defendant from any default in regard to notes that have not matured.

We do not, therefore, regard the cross error assigned by the plaintiff as well taken.

The judgment is therefore affirmed.

John Hurley v. Railroads.

IN GENERAL TERM, 1873.

JOHN HURLEY v. THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS RAILROAD COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILWAY COMPANY, THE CLEVELAND, CINCINNATI & INDIANAPOLIS RAILWAY COMPANY; THE INDIANA CENTRAL RAILWAY COMPANY; AND THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY.
Appellants.

RAILROAD CROSSING—

EVIDENCE—

INSTRUCTIONS BY COURT.

A railroad corporation is not only required to construct its tracks at a public crossing, so that they may be reasonably safe to persons driving across the same, but to maintain them in a reasonably safe condition.

In such construction, as well as in maintaining them in a safe condition, they are bound only to ordinary care and skill, the rights and duties of corporation and individual being mutual.

Evidence of the manner in which said crossings are generally constructed, is proper, as showing proper care and skill, but evidence of a *custom* of railroad companies in constructing street crossings, will not preclude the inquiry into the fact whether or not a particular crossing was properly constructed, or kept in sufficient repair to make a safe passage way over the railroad.

It is not error to refuse any particular instruction, if the substance thereof has been given, or included in instructions given by the Court.

Hendricks, Hord & Hendricks, for appellants.

Nichol & Jordan, for appellee.

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NEWCOMB, J.—The complaint in this case alleges that the several corporations defendant are a partnership, under the name and description of the Union Railway Company, and as such partners own and control a railroad track in the city of Indianapolis, that said track extends upon and across Meridian street in said city, and that it was, and is the duty of the defendants to construct, keep and maintain said crossing in a safe, and proper condition.

The first paragraph charges that the defendants neglected to keep, and maintain said crossing in good and proper condition, but suffered the same to become, &c.; that plaintiff, on, &c., was driving along said street across said railroad track, using proper care and diligence, and by reason of the improper condition in which defendants had wrongfully, and negligently suffered said crossing to get, the plaintiff's horse was thrown violently to the ground by reason of his foot becoming fastened in the planking of the crossing, and was so injured thereby as to render him worthless.

The second paragraph alleges that the crossing was improperly constructed by the defendants, too wide a space having been left between the iron rail and the planking on each side thereof, whereby the injury complained of was caused, &c.

A demurrer to the complaint was overruled, we think, correctly. The defendants then filed a general denial. The cause was tried by a jury, who found for the plaintiff, assessing his damages at \$150. A motion for a new trial was overruled, and judgment rendered in accordance with the finding, from which the defendants have appealed to the General Term.

At the proper time defendants' attorneys submitted five written instructions to the Court, three of which were given to the jury; the others, the third and fifth, were refused, and defendants excepted.

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The instructions so refused were as follows :

"3. If the defendant's tracks, at the place where the plaintiff's horse was injured, were constructed and maintained in the customary and usual manner in which such crossings are constructed and maintained, then the defendants had performed all the duty they owed the plaintiff, and are not liable."

"5. The burden of the proof as to every fact entitling the plaintiff to recover is upon the plaintiff, and he must make out his case by a preponderance of the evidence, or he cannot recover."

The fifth instruction was correct as a legal proposition, and ought to have been given unless substantially included in the instructions the Judge did give to the jury.

Among other charges the Judge gave the following:

"1. The plaintiff is bound to make out his case by a preponderance of the evidence."

"2. It was the duty of the defendants to so construct their track across Meridian street that it would be reasonably safe to persons driving their horses across the same; and after they had so constructed the track it was their duty to maintain the same in a reasonably safe condition, taking into consideration the rights of such passers along the street, and the rights of the defendants to use their tracks to run cars over the same."

"3. If the defendants both constructed and maintained said Union railroad track across Meridian street, so that it was reasonably safe for persons driving across the same, then the law is for the defendants."

"4. The jury are not authorized to infer that the crossing was negligently constructed or maintained, from the fact that the plaintiff's horse was caught and injured. It must appear from the evidence that the injury was caused by the improper manner in which the track was constructed or maintained."

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"5. The law does not impose upon the defendants the duty of so constructing and maintaining their tracks that it is impossible for a horse's foot to be caught and injured. They are only bound to use ordinary care in the construction and maintenance of their tracks."

The above instructions, as given in connection with instructions on other branches of the case, informed the jury as to the facts necessary to be established by the plaintiff, and that those facts must be proven by preponderance of the evidence, in order to justify a verdict in plaintiff's favor.

We think, therefore, that no error was committed in refusing the fifth instruction asked by the defendants, as it was in effect included in the instructions as given.

As we understand the third instruction asked by the defendants, it proposed to take from the consideration of the jury the question whether the street crossing in controversy had, in fact, been properly constructed, or if so constructed, whether it had been maintained in a reasonably proper manner; and that, as a matter of law, the jury were to find for the defendants if they constructed and maintained the crossing in the usual manner in which such crossings are constructed and maintained.

Evidence of the manner in which such crossings are generally constructed by railroad builders was proper as tending to show proper care and skill in the construction of the track in controversy, if built in the usual and customary manner; and evidence on that point was introduced without objection, on the trial; but we cannot assent to the doctrine that the custom of railroad companies in constructing street crossings precludes inquiry into the fact whether or not a particular crossing was properly constructed, or kept in sufficient repair to make a safe passage way over the railroad.

In *Shearman & Redfield, on Negligence*, §444-446, it is

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said: "A railroad company is bound to lay its track and road bed in such a manner, and keep them in such condition as to make the road safe for the use of its passengers, and of all persons having a right to pass over it, or be upon it, or to have their property thereon. * * In laying down a railroad upon a public highway, ordinary care and skill must be used to make the track harmless to persons, animals, or vehicles passing along the highway. And, as in other cases, the degree of care and skill required is to be estimated in view of the whole circumstances, taking into account the obvious risk of danger to travelers, and the necessity of caution to avoid numerous injuries. That the rails ought not to be so laid as to entangle horses' feet, if by ordinary skill such a result could be avoided."

In the case of *The Toledo & Wabash Railroad Company v. Goddard*, 25 Ind., 186, our Supreme Court lays down the rule as follows:

"The rights and duties of a railroad company and of persons traveling on a public highway, crossing the track of the railroad, are mutual. Both have the right to pass, and both are bound to use ordinary care and diligence in doing so to avoid injury.

"Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury. It must be in proportion to the danger to be avoided, and the fatal consequences involved in its neglect."

Perhaps a more stringent rule as to the construction of railroad crossings is laid down in the fifth clause of Section XIII of the general railroad law of this State. 1 G. & H., 509. That clause of the act empowers railroad companies, "to construct their road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its

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road should intersect, *in such manner as to afford security for life and property*; but the corporation shall restore the stream or water-course, road, or highway, thus intersected, to its former state, or in a sufficient manner *not to have unnecessarily impaired its usefulness*, or injured its franchises.

At all events, we think it was the province of the jury to determine, under the evidence, whether the crossing in question had been constructed with reasonable care and skill, and whether, if so constructed, it was, at the time of the injury complained of, in reasonably safe repair.

The instructions given on these points were, in our opinion, correct, and the third instruction asked by the defendants was properly refused.

The judgment at Special Term is affirmed at the costs of the appellants.

NOTE.—The lawful maintenance of its track in a street or highway, gives a railroad corporation no exclusive right of use of the portion of the highway on which the track is laid, and the law of the road, requiring the drivers of carriages, on meeting, to turn seasonably to the right, does not apply to the meeting of a railroad car, and a common carriage. 1 *Smith*, 880, (*Hegan v. Eighth Avenue Railroad*).

A railroad company is not liable for every accident which occurs by reason of its track being lawfully laid in the street of a city. M's horse in being driven across such a track got one of his hoofs between the rails, and was lamed. *Held*, that the burden lay upon him to prove negligence in the construction, or maintenance of the track, as the cause of the injury. *Mazetti v. New York & Harlem Railroad*, 3 *E. D. Smith*, 98.

A person lawfully using a street traversed by a railroad track, is bound only to use ordinary care.

Authority to occupy and use streets, privileges and liabilities incident thereto. See *Dillon on Municipal Corporation*, Sec. 560, *et seq.*

Liability of Railroad Companies for negligence, discussed. 7 *Am. Law Reg.*, (N. S.) 449.—[REPORTER.



Leas and France v. Grubbs and Kline.

IN GENERAL TERM, 1873.

ISAAC LEAS AND WILLIAM H. FRANCE v. ROBERT M. GRUBBS
AND JOSEPH KLINE, Appellants.

WITNESS—*testimony of, to contract—*

CONTRACT—*instructions of Court on.*

Where an issue is presented that depends upon the making or revocation of a contract, between one of the parties to a suit, and a third person, a competent witness may testify to what was done and said between the parties to a contract, with reference to the making, or revoking the same, although the other party to the suit may not have been present at the transaction and conversation.

It is proper for the Court to instruct the jury as to the terms and legal effect of a written contract which is in evidence.

E. A. Parker, for appellant.

Bloomer & Bradbury, for appellees.

BLAIR, J.—This is a suit by the plaintiffs, Isaac Leas and Wm. H. France against Robert M. Grubbs and Joseph Kline, on a promissory note made by the defendants to the plaintiffs, on the 26th day of January, 1872.

The defendant, Grubbs, suffered a default.

The defendant, Kline, answered that the note was given for a certain patent right, which the plaintiffs represented they were the sole owners of, when in fact they had before that time conveyed a one-half interest in the patent to one A. C. Ball.

To this answer it was replied that a contract was made granting to Ball a one-half interest, but that in the contract

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the plaintiffs reserved a right to revoke the same on certain contingencies, and that it was revoked before the sale to the defendants.

The cause was tried at Special Term before a jury, resulting in a verdict and judgment for the plaintiffs for the full amount due upon the note.

The defendant Kline made a motion for a new trial, which motion was overruled and excepted to by the defendant.

The first error complained of is the admission over the objection of the defendant Kline, of certain testimony of Leas, one of the plaintiffs, of a conversation and agreement with Ball touching the rescision of the contract between the plaintiffs and Ball. It was objected that the plaintiff Leas could not testify as to what occurred, or was said between himself and Ball touching this matter, because the defendant Kline was not present at the conversation.

It was a question presented by the issues whether the contract with Ball had been revoked or not, before the sale to the defendants and the making of the note.

The question of revocation depended entirely upon what transpired between the plaintiffs and Ball, it was a matter in which they alone were concerned, and about which they alone could make an agreement. From what was done and said between the plaintiff and Ball, the Court and jury were to determine whether or not the contract was revoked. The plaintiff Leas was a competent witness, and it was proper for him to state the transaction and negotiation about the rescision just as it occurred. Where an issue is presented that depends upon the making of a contract, or revoking a contract between one of the parties to a suit and a third person, a competent witness may testify to what was done and said between the parties to the contract with reference to making or revoking the contract, although the other party to the suit may not have been present at the transaction and conversation.

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The next error is that the verdict of the jury was contrary to law and the evidence.

We have examined the evidence and think the verdict is fully sustained, even by the evidence introduced by the defendant himself.

A general assignment of error is made to the instructions given by the Court, but our attention is only called to the second instruction.

It is objected that in this instruction the Court presumed to decide upon facts which should be left to the jury. The written contract between the plaintiffs and Ball was in evidence, and its proper construction and legal effect was important to be made known to the jury.

It is certainly unnecessary to cite authorities to support the proposition that the construction of a written contract is a question for the Court. It is proper for the Court to instruct the jury as to the terms, and legal effect of a written contract which is in evidence. This is all the Court did in the second instruction, and it is, therefore, not open to the objection made by the defendant.

Judgment affirmed.

Strohmier v. Stumph.

IN GENERAL TERM, 1873.

EDWARD STROHMIER, Appellant, v. JOHN STUMPH.

TRANSCRIPT—from Justice, requirements of—
JURISDICTION—of Inferior Court.

The summons, and officers return thereto, are not required to be copied at length on the Justice's docket. It is sufficient if such transcript shows the fact, that these, *inter alia*, statutory requirements, giving the Justice jurisdiction over the persons of the parties have been judicially passed upon by him.—*Newcomb, J.*

"Where the jurisdiction of an inferior court depends upon a fact, which such court is required to ascertain and settle by its decision, such decision is conclusive.

Where it appears from the record that the evidence of certain facts, requisite to give an inferior court jurisdiction, have been adjudged sufficient, a finding and judgment upon such jurisdictional facts cannot be impeached collaterally, hence an answer to a suit on such judgment, that the process was not served by the proper officer, is bad.—*Perkins, J.*

Seidensticker—Taylor, Rand & Taylor, for appellee.

Oyler & Howe—Voss, Davis & Holman, for appellant.

NEWCOMB, J.—The appellant sued Stumph and William Strohmier, before a Justice of the Peace of Marion county, on a judgment rendered against them in appellant's favor by a Justice of the Peace of Johnson county, Indiana. Process was returned "not found," as to the defendant Strohmier. Stumph was served, appeared to the action, and judgment was rendered against him, from which an appeal was taken to the Superior Court.

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The trial at Special Term resulted in a finding for Stumph, and a judgment in his favor over plaintiff's motion for a new trial.

The only question in the case arises on the ruling of the Judge at Special Term, in rejecting as evidence a duly certified transcript of the Johnson county judgment, on which the suit was founded.

That transcript, after reciting the filing of the complaint and bill of particulars, shows the issuing of a summons and a delivery of the same to "Wm. Snyder, Marshal." The entry of the proceedings had on the return day of the summons, shows an appearance by the plaintiff, and adds "and the defendants William Strohmier, and John Stumph being called, came not, and it appearing that the summons in this case was duly served on each of them more than three days before the time set for trial, whereupon the witnesses were sworn and trial had," &c.

Does this transcript show that the Johnson county Justice had acquired jurisdiction of the defendants before hearing the cause and rendering his judgment? Neither the summons or return are set out in the transcript nor was it necessary that the Justice should copy them in his docket entry. *Taylor v. McClure et al.*, 28 Ind., 39. We must therefore look to the docket entries of which the transcript is a copy, in deciding this question.

Had the Justice stated in his docket entry that the person to whom the summons was delivered was a Constable, the case would have been precisely like that of *Taylor v. McClure*, *supra*, but in the absence of that statement, it was held at Special Term that the transcript failed to show that the Justice had acquired jurisdiction of the persons of the defendants, wherefore the judgment was void. On the other hand, appellant's counsel assume that as the Justice found that the summons had been duly served the statutory period

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prior to the trial, jurisdiction is shown, and the judgment cannot be attacked collaterally.

The Justices' Act, 2 G. H., 582, contains these provisions:

"SEC. XX. Suits may be instituted before Justices by agreement or process, and the delivery of the process to the officer authorized to receive the same, if by process, and the entry of the fact upon the docket, if by agreement, shall be deemed such commencement; and it shall be the duty of such officer to write on such process the date when it came to his hands."

"SEC. XXI. Except in cases otherwise provided, such process shall be a summons, specifying a time not less than three nor more than thirty days from the date, and a place at which the defendant shall appear," &c.

"SEC. XXII. Such summons shall be served at least three days before trial by reading the same to defendant, or or leaving a copy thereof at his last usual place of residence, and if not so served, such cause shall be continued for a reasonable time."

"SEC. LXI. If the defendant, being legally notified, fail to appear, judgment may be rendered against him by default, upon proof heard, for the amount of the plaintiff's demand."

These sections of the statute require a Justice of the Peace, before he can hear a cause and render judgment against a defendant who does not appear, to find that the process went into the hands of a proper officer, and was served on the defendant by him, at least three days before the day fixed for the trial, in one of the methods prescribed. If the summons has been so served, the Justice may proceed to a hearing in the absence of the defendant; if there has been no service, he must issue an *alias* process, and continue the cause for service, and if the process has been served, but not three days before the day set for the trial, he must continue the case for a reasonable time. These are facts that must

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be judicially passed upon by the Justice. In the case under consideration the transcript shows that they *were* passed upon, and the finding was that the summons was duly served on the defendants, more than three days before the day set for trial.

In the *Evansville, &c., Railroad Company v. The City of Evansville*, 15 Ind., 395, our Supreme Court say: "It is a well settled principle, that where the jurisdiction of an inferior court depends upon a fact which such Court is required to ascertain and settle by its decision, such decision is conclusive."

In *Sheldon v. Wright*, 1 Selden, 497, it was held that when certain facts are requisite to give an inferior court jurisdiction over the persons of parties, and it appears from the record of its judgment that there was evidence tending to prove such facts, and that such evidence was adjudged to be sufficient, such judgment cannot be collaterally impeached or contradicted. See, also, 2 *Smith's Leading Cases*, 832.

In the light of these authorities the judicial decision of the Justice that process had been duly served on the defendants, more than three days before the day set for hearing the cause, is one that must be respected by other courts when brought collaterally in question. There was nothing on the face of the transcript to a want of jurisdiction; on the contrary it shows that everything necessary to be done to give the Justice jurisdiction of the persons of the defendants had been done. The transcript should, therefore, have been admitted as evidence.

The judgment at Special Term is reversed, with costs, and the cause remanded with instructions to grant the plaintiff a new trial.

An appeal was again taken in this case upon another issue, when in the December Term, General Session, the former ruling of Judge Newcomb was adhered to in the following opinion by Judge Perkins:

Strohmier sued Stumph and another on a judgment ren-

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dered by a Justice of the Peace of the County of Johnson, Indiana.

The judgment was rendered upon default of appearance by the defendants. The transcript of the judgment recites the filing of the complaint and bill of particulars, the issue of a summons to the defendants, and its delivery to Win. Snyder, Marshal.

On the return day of the summons the following entry was made by the Justice, "January 17th, 1871, time set for trial. The plaintiff in person, and by Oyler & Howe, his attorneys, appeared, and the defendants William Strohmier and John Stumph, being called, come not; and it appearing that the summons in this case was duly served on each of them more than three days before the time set for trial," and thereupon the Justice proceeded to hear proof of the claim, &c., and rendered final judgment for the plaintiff for one hundred and ninety-one dollars and costs.

The words "duly served" are required only to a statement that the summons was served on the defendants, by a proper officer, at proper times, and places, and in a proper manner, "more than three days," &c.; in short, that by what had been done, the Court had acquired jurisdiction of the persons of the defendants—that previous clerical entries as to the officer to whom process issued, inconsistent with this conclusion, were mistakes, or that the process, if issued to, and in a proper person, had been subsequently delivered to, and served by a proper officer.

It was accordingly decided in this case, when before this Court at a former term, that the above entry of the Justice showed a judgment of the Court, that service of process had been legally made, and that the Court had acquired jurisdiction of the persons of the defendants, and brought the case within the rule of law thus stated: "Where the jurisdiction of an inferior court depends upon a fact which

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such court is required to ascertain and settle by its decision, such decision is conclusive, when it comes collaterally in question." (See the opinion at the former term by Judge Newcomb). The simple question that we have to decide in the case now, is this: Is an answer to a suit on a judgment showing such a finding as above stated on the fact of personal jurisdiction, averring that process was not served by a proper officer, good?

This Court was right in its former ruling that the entry of the Justice quoted above, was a finding and judgment upon a jurisdictional fact, not impeachable collaterally, then such an answer as that mentioned is bad. The Court adheres to the former ruling.

Judgment affirmed.

Council for appellant, cited. * * *

The transcript in this case does not show a copy of the summons and return, nor does it show affirmatively who served the summons, but it does appear that summons was duly served more than three days before the judgment.

It was decided in 4 *Blackford*, 169, that such a judgment was a *nullity*.

In 5 *Blackford*, 332, it was decided to be *erroneous* merely, and not void.

In 7 *Blackford* all these decisions are *overruled*.

In 9 *Ind.*, 479, it is held under the statute, 2 vol. 1852, p. 159, that such judgment, in a particular case in Court of Record, was *erroneous*.

Again, in 28 *Ind.*, 39, that such judgment before a Justice of Peace is not *void*.

If it is only *voidable* on account of some irregularity of service, that irregularity is not available *here* and *now*, as there was another mode of correcting an *irregularity*, and having failed to avail himself of that mode, he cannot now attack the judgment as void.

But suppose the summons was served by a person not a Constable, may not any one serve a summons, and append an affidavit of service, and would a judgment by default be

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regular? or would it be irregular and voidable only? or would it be void? In New York it would be *regular*, and only irregular and voidable if served by plaintiff himself.

See 2 Vol. *N. Y. Practice*, (*Tiffany & Smith*) 204, §1. How much of this authority rests on the code and rules of practice of N. Y., we cannot say, but we have no authority local to our State to the contrary.

These remarks are made upon the theory that by proper plea or evidence, under the general issue the *service*, was properly before the Court.

On the same theory we may speculate a little on the law governing Mayors and Marshals of cities, to determine, if the question had been raised by plea or evidence, whether the service had been made by the City Marshal, or not, and whether if so made, it was *regular*, or irregular and voidable, or absolutely void? The Court will see by Chap. 11, §17, p. 68, 3 Vol. Statutes (by Davis,) that the Mayor has some jurisdiction as Justice of Peace "in all matters, civil and criminal," and that §18 of the same, the Mayor may for certain reasons deposit his Docket with a Justice, &c.; and that by Chap. 5, p. 75, §29, it is the Marshal's duty to attend upon and execute all process in Mayor's and Justices' Courts, and preserve order in all cases where he has served process to bring a party into Court—which means of course, in cases where the Justice is acting as Mayor—and when so acting as Mayor, may he not direct process to the Marshal? Or whether we regard the Justice as acting as Mayor, or as Justice, may he not under these provisions issue to a Marshal, and may not the Marshal make good service? and if *not good*, is it merely irregular, or is it void?

We find a strong confirmation of this view of the authority and duty of City Marshal by reference to L. G. & H. 221, §23, where the Marshal is given all the power that is required in this case; under one rule of interpretation, we are to look to old law for light.

NOTE.—The jurisdiction of the Justice is to be determined in the appellate Court, not by the amount of the recovery, but by the amount legally due or actually claimed at the time judgment was rendered. *Crabtree v Chiatt*, 22 Ala., 181.

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"The error complained of must *appear upon the record*, and unless points intended to be raised for revision, are set out in the record with reasonable certainty, so as to enable the Court to decide without danger of mistake, the exception, or point reserved will be disregarded." See *Hilliard on New Trials*, p. 500, Sec. 58, and note 8.

The general rule is, that the proceedings in the Court below are *presumed to be right*. Same 505, Sec. 68, and notes.

The Court is confined to adjudication of errors of law upon the record, and cannot look beyond them. *Cathcart v. Com.*, 37 Penn., 108. See *Hilliard on New Trials*, p. 507, Sec. 65, 551, 24.

A defect in a summons in a case before a Justice of the Peace cannot be taken advantage of in an appeal. *Metz v. Eddy*, 21 Miss., 18.

The transcript must show jurisdiction in the Court from which it is sent. See *Hilliard on New Trials*, 586, Secs. 62-63; and the Court above has jurisdiction on appeal from a Justice of the Peace where the Justice had jurisdiction, however defective the service may have been, and by taking an appeal the appellant gives jurisdiction, even where there was not service. Same, 64, and *Swingley v. Haynes*, 22 Illinois, 214.

Where a limited tribunal exercises jurisdiction which does not belong to it, its decision amounts to nothing, and requires no appeal. See *Osgood v. Thurston*, 23 Pick., 110; *Baltimore v. Porter*, 18 Md., 284.

On appeal from a Justice, his rulings cannot be revised; *Harper v. Baker*, 9 Miss., 116; the case must be retried on its merits in the Court above.

"A case will not be dismissed on appeal because the amount of damages awarded by the Justice exceeds his jurisdiction, nor because it exceeds the *ad damnum* of the writ. See *Wallace v. Brown*, 5 Foster, 216; *Spear v. Place*, 11 Howard, 522; *Prettyman v. Waples*, 4 Harring, 299; *McKinly v. McCalla*, 5 Binney, 600. See, also, *Hilliard on New Trials*, 604, Sec. 119.

As to statutory requirements, as to a return of the proper paper; see *Hilliard on New Trials*, 607, Sec. 133, *et seq.* See 1 *Greenleaf on Evidence*, 518, and note. Also, 5 Mass., 260; 6 N. H., 217; 3 *Ibid*, 108; 18 John., 146; 6 Mass., 399; 2 Day, 122; 6 Blackford, 545; 4 *do.*, 12, 176.—[REPORTER.

Reid v. Brown.

IN GENERAL TERM, 1873.

JOHN B. E. REID v. WILLIAM J., AND MARY M. BROWN,
Appellants.

PRACTICE—*answer.*

FRAUD—*answer of.*

An answer of fraud without averring particulars amounting to fraud is bad.

A general answer of fraud is not good under the code.

An alleged fraudulent grantee of a debtor cannot attack the judgment of his creditor, except for fraud.

Barbour & Jacobs, for appellant.

Nichol & Jordan, for appellee.

PERKINS, J.—The plaintiff, Reid, on the 30th of September, 1871, obtained a judgment in the Superior Court of Marion county, Indiana, against Wm. J. Brown, for the sum of two hundred dollars and costs of suit.

Execution was duly issued on the judgment, and returned no property found, &c.

The plaintiff, Reid, then instituted suit in the same Superior Court, against said Wm. J. Brown and Mary M. Brown, his wife, alleging in his complaint that the defendant, Wm. J. Brown, had caused certain property, described in the complaint, to be conveyed, without consideration, to his wife, said Mary M. Brown, with intent to defraud his creditors'

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and particularly the plaintiff, Reid, who had obtained judgment, as above stated, against him.

The defendant, Mary, answered :

1. The general denial.
2. That the judgment against Wm. J. Brown was without consideration, and obtained through fraud.
3. That the judgment was except as to fifty dollars, without consideration, and obtained through fraud.

A demurrer to the second, and third paragraphs of the answer was sustained.

This ruling was correct :

An answer of fraud that fails to aver particulars amounting to fraud is bad. The simple fact that the judgment was not upon a valid consideration, did not necessarily constitute it. A general answer of fraud is not good under the code. *Jenkins v. Long*, 19 *Ind.*, 28; *Honeywell v. Holmes, Ind.*, 321.

The plaintiff recovered judgment against Mary M. Brown.

She moved for a new trial; her motion was overruled, and final judgment rendered. Alleged erroneous admissions, and rejections of evidence was the ground of the motion for a new trial. On the trial the Court permitted the judgment for two hundred dollars, in favor of Reid against Wm. J. Brown, to be given in evidence against Mary M. Brown, a stranger to it, and refused to permit said Mary M. to introduce testimony tending to show simply want of a valid consideration for that judgment.

In thus ruling, the Court did not err. That judgment, (the Court rendering it having had jurisdiction,) was admissible in evidence to prove the indebtedness of Wm. J. Brown, and could be impeached by Mary M. Brown, the alleged fraudulent grantee, only for fraud, notwithstanding she was not a party to the judgment. *Sumner v. Coleman*, 20 *Ind.*, 486, and cases cited; *Burgess v. Simonson*, 45 *N. Y. Court of Appeals*, 225. This latter case, is, in its facts, much like the

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case at bar, and is a direct authority in point of law, in support of the decision in Special Term. In *Candee v. Lord*, 2 N. Y. Court of Appeals, 269, (2 Comstock) the reasons why an alleged fraudulent grantee of a debtor cannot attack the judgment of his creditor, except for fraud, are stated. In that case it was not permitted to be shown that the judgment was rendered upon a forged indorsement of a promissory note. See *Stockwell v. Byrne*, 22 Ind., 6.

“For the same reasons [say appellant’s counsel, that we asked a new trial] we object to the instructions of the Court numbered five, six, seven and eight, as they are all based upon the hypothesis that the wife was estopped from inquiring what was equitably due to Reid, and was held by the Court as concluded by the judgment against her husband.”

That she was so concluded, on the points specified, we have already shown; and as these are the only objections urged against the instructions, we have examined them with a view to no other.

The judgment is affirmed.

Farman v. The Board of Commissioners of Marion County *et al.*

IN GENERAL TERM, 1873.

FRANCIS L. FARMAN, Appellant v. THE BOARD OF COMMISSIONERS OF MARION COUNTY, ADAM SCOTT
AND DAVID NICHOLSON.

APPEAL—from Board of Commissioners, when may be taken.

Section 81 of the Act creating Boards of Commissioners, is not to be construed as covering all orders, or entries made by the Board on its Records. An appeal under this section is allowed only from such decisions of the Board as in their nature are *judicial*, and not where they are purely *administrative*.

An appeal does not lie to this Court from an order of the Board of County Commissioners accepting a bid for stone work on the County Court House, taken by a rival, and unsuccessful bidder.

Gordon, Browne & Lamb, for appellant.

Barbour & Jacobs—Hendricks, Hord & Hendricks, for appellee.

NEWCOMB, J.—The Board of Commissioners of Marion county, having previously determined to build a Court House, on the 6th day of November, 1871, ordered their architect to advertise for sealed proposals, or bids to do the stone work on the Court House, and in obedience to said order the architect gave such notice. On the 2d day of January, 1872, said Commissioners opened the bids and awarded the contract to Scott & Nicholson, who were bidders. Farman was also a bidder, and upon the contract being awarded to Scott & Nicholson, he appealed from said award to this

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Court, and made the Board of Commissioners and Scott & Nicholson parties to the appeal. At Special Term the appellees each moved to dismiss the appeal upon the following grounds :

1st. Because this Court has no jurisdiction of the subject of the appeal.

2d. Because the appeal shows no cause of action against defendants.

3d. Because said Farman has no interest in the subject of the appeal.

4th. Because no appeal has been taken from the action of Board of Commissioners.

5th. Because the action of the Board of Commissioners was one from which no appeal lies.

The Court entertained the motion, and Farman has appealed to General Term, and asks that the order of dismissal be set aside, and the case tried on its merits.

There are two questions raised by the record :

1st. Does an appeal lie from an order awarding this contract to Scott and Nicholson ?

2d. If an appeal lies, does the record show that Farman had such an interest as to entitle him to take and maintain an appeal. ?

It is claimed that the appeal from the award of the Board of Commissioners is allowed under Sec. 31, of the act creating said Board and defining its powers and duties, which reads as follows :

“ From all decisions of such Commissioners there shall be allowed an appeal to the Circuit, or Common Pleas Court, by any person aggrieved ; but if such person shall not be a party to the proceedings, such appeal shall not be allowed unless he shall file in the office of the County Auditor his affidavit, setting forth that he has an interest in the matter

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decided, and that he is aggrieved by such decision, alleging explicitly his interest."

Farman filed an affidavit before the Board of Commissioners, stating that he had an interest in the matter of letting the contract to Scott & Nicholson, that he had made a bid for the said stone work which was more than nine thousand dollars less than the bid of Scott & Nicholson, while said Board accepted their's and rejected his, and that he was entitled to be awarded the contract, because his was the lowest responsible bid for said work. It is urged by counsel for Farman that the section of the statute above cited is broad enough, and was intended, to cover all orders, or entries made by the Board of Commissioners on its records, whether such orders should be what are technically called Judicial decisions, or the awarding, or making contracts. The counsel for appellees urge that the words "From all decisions of such Commissioners there shall be allowed an appeal," &c., means only from such decisions as in their nature are *judicial*, and does not include such as are purely administrative. We have been referred to the case of *Hanna v. The Board of Commissioners of Putnam county*, 29 Ind., 170, as sustaining the position that appeals lie from all *orders* of the Board, except such as are purely *legislative*; That case was one in which the Board had made an order to purchase a piece of land for a poor farm, the county already having one, and a tax payer appealed from that order, and the Court held that, *although the order was a legislative one*, an appeal would lie because the Board *had no power to make* such order, as it had already been *exhausted* by the purchase of a poor farm, and the law did not contemplate the purchase, and maintaining of more than one poor farm by the county. That case is not in point. The order of *Board to construct* a Court House, would be similar in principle to the order to buy a poor farm, if the county already

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had a suitable Court House, and the Commissioners proposed to build another, and maintain both. In that case, according to the above decision, an appeal would lie by a taxpayer.

If that case had been an appeal from an order to construct a house, or making other improvements on the poor farm it would have been nearer in principle to this.

If an appeal lies from an order making this contract with Scott & Nicholson, one will also lie from every contract the Commissioners may make in relation to the construction of the Court House, and we can not see why not from every order made for the employment of a party to do the smallest job for the county. This would virtually place the *administrative* business in the hands of the Courts, instead of the Board of Commissioners, where the law places it.

We think that the word "*legislative*," as used in the case of *Hanna v. The Board of Commissioners*, *supra*, was used inadvertently for administrative, and according to that opinion an appeal lies only from administrative orders where the Board of Commissioners has already exhausted its powers on the subject appealed from.

We are therefore of opinion that no appeal lies from the order of the Board of Commissioners in this case, and the Court at Special Term committed no error in dismissing the appeal.

If this appeal can be maintained then it follows, that we must reverse the judgment and send the case back to Special Term with instructions to try it, and if Farman's bid was the lowest, award the contract to him, thus virtually taking the business of the Board of Commissioners into our own hands; or direct them not to contract with Scott & Nicholson on their bid, and leave them to contract with another party, or parties, and on such terms as they may think best; and if any competing contractor is not satisfied he may appeal from that award also.

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It cannot be successfully contended that Farman's bid, if the lowest, was a contract, until it was accepted by the Board. Here we are not called upon to specifically execute a contract *already made, but to make one*. If it was already made, is it not of that class which Courts will specifically execute? We do not believe we have the authority on appeal to require the Board to accept one offer in preference to another. This is a matter that must necessarily be left to the discretion of the Commissioners, and for an abuse of that discretion an appeal is not the remedy. We do not desire to be understood as intimating that there is any abuse, as that could only be inquired into on the trial of the merits, and this Court having no such jurisdiction, could make no such inquiry.

The conclusion we have come to on the first proposition renders it unnecessary to dispose of the second.

We will, however, say that we do not think Farman shows in his affidavit such facts as would entitle him to maintain an appeal.

The judgment at Special Term is affirmed.

Quwack v. Cruse, and the Cabinet Makers' Union.

IN GENERAL TERM, 1873.

CHARLES QUWACK v. JOHN P. CRUSE, AND THE CABINET
MAKERS' UNION, Appellants.

PLEADING—*reply, demurrer*—

PRACTICE—*objections, exceptions—special finding, judgment on.*

EVIDENCE—*contract.*

Where two paragraphs of a reply are the same in legal effect, and no objection is taken to one of them, the defendant is not injured by overruling a demurrer to the other.

If the Court, at the request of one of the parties makes a special finding of facts and conclusions of law thereon, the statute requires judgment to be entered in accordance with the conclusions of law, and the only mode of saving objections to the conclusions of law is by entering exceptions to the same. A motion for judgment on the special finding will not present the question; nor will a motion for a new trial.

Where A contracted to sell to B all the brick he should make and burn except the last kiln, at certain prices for each kiln, and deliver the same wherever in the city of Indianapolis, B should direct, and after A had burned one kiln he delivered the same to B, who accepted them on the contract, and before the second kiln was ready for delivery B informed A that if the second kiln had more lime in it than the first, he must get another purchaser for it, but that he wanted to see it before it was sold, that he wanted the good portions of it, but A must get another purchaser for the portion having too much lime, and the second kiln had in fact more lime in it than the first, and that it was not from any fault or fraud of A that the lime was in the kiln, the lime being in the clay, and B. knowing at the time of the contract the place where the clay to be used was to be obtained, and before B saw the second kiln A sold it to another,

Held: That the lime in the brick of the second kiln did not justify the defendant in refusing to take any portion of the brick.

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Held: That A after having received notice from B, that if the second kiln had more lime in it than the first, he would not take it or that he would only take the good portions of it, might treat the contract as broken by B, and if A chose to waive his right of action against B for the breach, and protect himself from loss by selling to another, he had a right to do so, and B, having thus broken the contract cannot complain

Held: That B having given notice that he would not comply with the contract as a whole, he could not, without the consent of A, acquire any rights under the contract by offering to examine the kiln and take the good portions of the brick.

Mitchel & Ketcham, for appellants.

Taylor, Rand & Taylor, for appellee.

BLAIR, J.—The complaint in this case is for brick sold to the defendant Cruse and used by Cruse in the erection of a building for the defendant, The Cabinet Makers' Union, the complaint alleging notice to the Cabinet Makers' Union, under Sec. 649 of the Practice Act, and avering that the Cabinet Makers' Union was indebted to Cruse at the time the notice was given.

The Cabinet Makers' Union answered in general denial.

The defendant, Cruse, answered in three paragraphs.

The first, a general denial; the second is a counter claim alleging that the plaintiff agreed to sell the defendant Cruse all the brick he should make and burn except the last kiln, at certain prices for each kiln, and deliver the same wherever in the city of Indianapolis the defendant should direct; that the first kiln burned by the plaintiff was delivered, that afterwards other kilns were made and burned by the plaintiff, but the price having advanced, he failed and refused to deliver them as ordered, by reason of which the defendant was damaged. The third paragraph of answer was substantially the same, except that it set out a written contract for the sale of the brick. The written contract set out, is substantially the same as the contract alleged in the second paragraph.

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The plaintiff replied in five paragraphs, all of which except the first, which is a general denial, are substantially the same, and set up a rescision, and abandonment of the contract after the making, and delivery of the first kiln of brick.

There was a trial by the Court, and a special finding of facts and conclusions of law, upon which the Court rendered a judgment in favor of the plaintiff, and against the Cabinet Makers' Union, for \$281.35, and against defendant Cruse for costs. A general exception was entered to the finding; and while it may be a question whether it is sufficiently specific to some questions of law under Sec. 341 of the code, we have chosen to treat it as though it was in proper form. The defendants each filed separate motions for a new trial, which were overruled and excepted to.

The defendant, Cruse, then filed a motion for judgment against the plaintiff on the special finding of the Court, notwithstanding the conclusions of law, "for the reason that the conclusions of law are erroneous."

This motion was, likewise, overruled by the Court, to which the defendant excepted.

An appeal was then taken to the General Term.

The first error assigned is the overruling of the demurrer to the amended fifth paragraph of the reply. The plaintiff avers in this paragraph that the only agreement between the plaintiff, and the defendant was in writing, and is the same set out in the third paragraph of answer, and it avers that after the brick in the complaint set out were delivered to the defendant and were received by him, the said contract was rescinded and abandoned.

The defendant insists that the reply was bad because it did not show that the contract was rescinded before any rights had accrued to the defendant under the contract.

As the defendant admits in his counter-claim that he received the first kiln of brick under the contract, and only

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complaints because other kilns were not delivered, we think it sufficiently clear, from the reply, that the recision therein pleaded, was made before the time for the delivery of the brick contained in the other kilns burned by the plaintiff, and hence before the rights of the defendant had accrued.

In any event the defendant could not have been injured by the ruling, for the fourth paragraph of reply is precisely the same in legal effect as the fifth, and to it no objection is made.

The second alleged error is the overruling of the motion of the defendant Cruse for judgment in his favor "on the special finding, notwithstanding the conclusions of law, for the reason that the conclusions of law are erroneous."

If the Court, at the request of one of the parties, makes a special finding of facts and conclusions of law thereon, the terms of the statute, (*Sec. 341 of the code, 2 G. & H., page 207*) require judgment to be entered in accordance with the conclusions of law, and the only mode of saving objections to the conclusions of law is by entering exceptions to the same. A motion for judgment on the special finding will not present the question. Neither will a motion for a new trial. *Pedens, administrator, v. King et al.*, 30 *Ind.*, 181; *Rathburn v. Wheeler*, 29 *Ind.*, 601; *Luirance et al. v. Luirance*, 32 *Ind.*, 198. See, also, *Carter v. The Augusta Gravel Road Company*. *Wilson's Superior Court Reports*, 1, 14.

There was, therefore, no error in overruling the motion.

Exceptions were, however, taken to the conclusions of law, and the next error assigned is the alleged error in the conclusions of law upon the facts in the special finding.

The Court found that the contract set out in the pleadings was made, and at the time of making the contract, the plaintiff was operating a brick yard in the southern portion of the city of Indianapolis, that he burned one kiln of

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brick which was taken by the defendant Cruse on the contract, but Cruse complained that there was too much lime in them, and that there is due the plaintiff on the brick so taken the sum of \$281.35. That the plaintiff then made and burned a second kiln of brick, and the defendant Cruse before the same was finished, informed the plaintiff that if that kiln had more lime in it than the first one had, he, the plaintiff, must get another purchaser for it, but that he wanted to see it before it was sold to another, that he wanted the good portion of the kiln, and the plaintiff must get another purchaser for the portion having too much lime; that after receiving this information, and before the defendant saw the kiln, the plaintiff sold the kiln to one Adams, and after the sale the defendant demanded the brick, but did not state where he wanted them delivered. The plaintiff refused to deliver them because he had, after receiving the information from the defendant, sold them to another person, and because they had more lime in them than there was in the first kiln. The Court also found that there was more lime in the second than there was in the first kiln, and that it was no fault of the plaintiff that there was lime in the brick; that the lime was in the clay of which the bricks were made, and that the defendant, when he made the contract, was acquainted with the place where the clay was to be got. Other facts were found with reference to the indebtedness of the Cabinet Makers' Union to the defendant, notice, &c., under the law regulating mechanics liens, &c., which are not necessary to be noticed here.

Upon these facts the Court found as a matter of law that the defendant "Cruse was bound to take the brick under the contract as a whole, unconditionally, and not in parcels, and that his notice to the plaintiff operated as an abandonment of the original contract, and authorized the plaintiff to sell the said brick," and that the plaintiff was entitled to recover, &c.

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As the plaintiff was not in fault with regard to the lime in the brick, it constituted no valid reason to justify the defendant in refusing to take any portion of the brick. He contracted for the brick, knowing the place where they were to be made, and the material of which they were to be composed, obtained, and no fraud or wrong is imputed to the plaintiff.

The time had not come for the delivery of the second kiln of brick, before complaint was made of the lime in the brick already delivered, and the defendant was informed by the plaintiff, that if the second kiln had more lime in it than the first one had, he, the plaintiff, must get another purchaser for it; but that he wanted to see it and would take the good portion of the kiln, but the plaintiff must get another purchaser for the portion having too much lime in it. The plaintiff is thus informed in advance that the defendant will not comply with his contract, for in no event does he propose to take all the brick in the kiln.

The question thus presented is this: was the plaintiff, under the circumstances, bound to hold the brick subject to the order of the defendant, or might he treat the contract as broken, or abandoned by the defendant and dispose of the brick to other parties.

The following principles of law may be considered well settled by authority, as well as sustained by good sound reason.

If a party, bound to the performance of a contract at a future time, puts it out of his own power to fulfill it, an action will at once lie for the breach of the contract, and notice of an intended breach of a contract to be performed in future has a like effect.

In a recent case in the Exchequer Chamber, Cockburn, C. J., on a review of the authorities, says:

"The promisee, if he pleases, may treat the notice of

Quwack v. Cruse, and the Cabinet Makers' Union

intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any intervening circumstance which would justify him in declining to complete it."

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

Frost v. Knight, *Law Reports*, 7 *Exchequer* 111. See, also, *Hochster v. De la Tour*, 2 *E. & B.*, 678; *The Danube & Black Sea Co., v. Xenos*, 13 *C. B. (N. S.)* 825; *Avery v. Bowden*, 5 *E. & B.*, 714; *Reid v. Hoskins*, 6 *E. & B.*, 953; *Barwich v. Buba*, 2 *C. B. (N. S.)* 563.

By taking timely measures, on the receipt of notice of an intention not to comply with a contract to be performed in the future, the injurious effects which would otherwise flow from the non-fulfillment of a contract may be averted, or materially lessened, and the interests of each party better protected. *Frost v. Knight*, *supra*.

In view of these principles of law, we think the plaintiff, after having received notice from the defendant that if the second kiln of brick had more lime in it than the first one, he would not take it; or, at least that he would only take the good portion of it, might treat the contract as broken by the

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defendant, and if he chose to waive his right of action against the defendant for the breach, and protect himself from loss by selling to other parties, he had a right to do so; and the defendant having thus broken the contract cannot complain. Having given notice that he would not comply with the contract as a whole, he could not without the consent of the plaintiff acquire any rights under the contract by offering to examine the kiln, and take the good portions of the brick.

We see no error, therefore, in the conclusions of law.

Judgment affirmed.

IN GENERAL TERM, 1873.

HENRY C. FOX, Appellant, v. CONRAD BAKER, Governor of the State of Indiana.

VACANCY—*statute construed, legislative will.*

JUDGESHIP.

On the 14th day of March, 1867, A was appointed Judge of the Wayne Circuit Court, under the act of March 11th, 1867, and commissioned to serve until the general October election, 1867. At the October election, 1867, B was elected Judge of said Court, and commissioned as a Circuit Judge. On the 29th day of April, 1869, B died. On the 4th of May, 1869, C was appointed by the Governor, Judge of said Court, and commissioned to serve until the next general election. At the next general election in October, 1870, C was elected, and on the 12th day of November, 1870, commissioned to serve for the term of years

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to which he may be entitled by virtue of his election, and until his successor should be elected, &c. At the October election in 1872, the voters of Wayne county again voted for Judge of said Court, and D received a majority of the votes.

Held: That C, who was elected at the general October election in 1870, was entitled to hold the office for the period of four years from the date of his commission, and hence there was no vacancy in said office at the time of the October election in 1872.

Bradbury, for appellant.

PERKINS, J.—This cause was commenced by an application for a writ of mandate against the defendant, as Governor of the State of Indiana, requiring him to show cause why he should not issue to the plaintiff a commission as Judge of the Criminal Court of Wayne county, to which office he claims to have been elected at the October election 1872.

The defendant filed an answer setting out the reasons of his refusal to issue the commission.

An agreed statement of facts was filed, upon which the cause was submitted at Special Term, and a finding, and judgment rendered thereon for the defendant.

A motion for a new trial was overruled, and the plaintiff appealed to the General Term, the proper exceptions having been taken to the rulings at Special Term.

The facts contained in the agreed statement, as far as necessary to the consideration of the question presented, are as follows:

The Wayne Criminal Court was created by the act of the General Assembly of March 11th, 1867. On the 14th day of March, 1867, the Hon. Wm. A. Peele, was, according to the provisions of the act, appointed Judge of said Court to serve until the general election in October, 1867. At the October election, 1867, the Hon. Nimrod H. Johnson was elected Judge, and was commissioned as a Circuit Judge. He entered upon the duties of the office, and continued to serve

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as such until the 29th day of April, 1869, at which time he died.

On the 4th day of May, 1869, the Hon. George Holland was appointed as such Judge to serve until the next regular election thereafter. The next election was in October, 1870, at which time the said Holland was elected, and commissioned on the 1st day of November, 1870, "for the term of years to which he may be legally entitled by virtue of said election, and until his successor is elected, and qualified."

At the October election, 1872, the voters of Wayne county again voted to elect a Judge of said Court, and the plaintiff received a majority of the votes cast at said election for such office, all of which was duly certified to the office of the Secretary of State, and afterwards the plaintiff demanded of the defendant a commission, which was refused.

The question presented may be briefly stated thus: Was the Hon. George Holland, at the time he was commissioned, after having been elected in October, 1870, entitled to hold the office for the term of four years? If he was, there was no vacancy at the time the plaintiff claims to have been elected at the October election, 1872, and hence he would not be entitled to a commission.

The question depends upon the construction of certain statutes. On the part of the plaintiff it is claimed that the commission of the Hon. Nimrod H. Johnson, issued to him after his election in October, 1867, entitled him to hold the office for four years, which would make his term of office expire in October, 1871; and that after his death, the election of the Hon. George Holland, at the October election, 1870—and his commission only entitled him to hold the office for the unexpired portion of the term which the Hon. Nimrod H. Johnson would have been entitled to hold had he lived; and hence it is claimed there was a vacancy in the office at the October election, 1872.

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It is conceded, that at the time Johnson was elected and commissioned in October, 1867, the impression prevailed that the office was that of a Circuit Judge. This impression was, however, incorrect, as was afterwards decided by the Supreme Court in the case of *Clem v. The State*, 33 Ind., 418. It was held in that case that Criminal Circuit Courts were not *Circuit Courts* as contemplated by the provisions of the constitution, but were inferior courts, and the power to create such courts being given to the Legislature by Section 1 of Article 7 of the Constitution, such courts possessed a constitutional, and valid existence prior the act of May 13th, 1869, which for the first time fixed the term of office of the judges of such courts.

Prior to the act of May 13th, 1869, there was no statute fixing the term of office of the Judges of Criminal Circuit Courts. Fourteen days before the taking effect of that act, Judge Johnson had died, and there was a vacancy in the office for the unexpired term for which he had been elected, and though there was no law fixing the term of office, it could not have been under Section 2 of Article 15 of the Constitution, for a longer period than four years. Nine days before the taking effect of the act of May 13th, 1869, Judge Holland was appointed to fill the vacancy occasioned by the death of Judge Johnson.

At the time of the passage of the act alluded to, there was no one holding the office of Judge of the Wayne Criminal Court by virtue of an election by the people, and the appointment of Judge Holland only extended to the next general election.

It was evidently the intention of the Legislature, by the passage of the act of 1869, to fix the term of office of the Judges. It was passed to remove all doubts upon that question.

The section reads as follows: "The Judges of the Crim-

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inal Circuit Courts of this State elected, or to be elected, shall be entitled to serve for the term of four years from, and after their respective elections, and until their successors are elected, and qualified, &c."

It is claimed by the plaintiff that this section had, and was intended to have, a retroactive effect, and fixed the terms of the Judges elected in 1867, at four years, and hence the term of office of those so elected would expire in 1871, and hence that the act fixed a four years term for Judge Johnson, and although he was dead, the time intervening between his death and October, 1871, was but an unexpired portion of the term for which he was elected.

The position of the plaintiff, as far as it relates to the judges who were elected in 1867, and who were living at the time the act took effect, is conceded to be correct. But on the 13th day of May, 1869, there was no person holding the office of Judge of the Wayne Criminal Circuit Court who had been elected by the people.

At the time of passing the act affecting, and relating to public offices, it is to be presumed that the Legislature had a knowledge of the existing circumstances.

It was clearly not intended by the act, that Judges of Criminal Courts should all be elected at the same time, in order to secure uniformity, as is insisted was necessary, in the brief of the plaintiff. Laws had already been passed, and judges elected in Marion county in 1866, in Allen county in 1867, and in the counties of Jefferson, and Vanderburgh in 1868, and hence no uniformity in the commencement, or end of terms of office was secured, or intended; nor is such uniformity required by any provision of the Constitution.

The statute in question was the starting point, no tenure of office having been fixed by law before. It is the only act relating to the particular offices included therein, and while the rules of construction set out in the carefully prepared

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brief of the plaintiff are correct, it is the duty of the Court first to look to the "words and phrases" of the act itself, and see if "their plain and ordinary, and usual sense" will not enable us to ascertain the will of the Legislature.

But we are also referred to the 7th Section of "an act touching vacancies in office, &c.," which reads as follows: "Every person elected to fill any office in which a vacancy has occurred, shall hold such office for the unexpired term thereof." 1 *G. & H.* 672, *Sec. 7*. This section was enacted on the 13th of May, 1852, and is the general law touching vacancies in office. It applies to all cases not otherwise provided for, both as to offices in existence at the time of its passage, as well as those created since.

The State ex rel., Benton v. The Mayor of Laporte, 28 Ind., 248; Baker, (Governor,) v. Kirk, 33 Ind., 517.

The cases just cited are urged upon our attention by the plaintiff in support of his construction of the statutes. In each of them there was an apparent necessity to which the Court alludes for giving the construction placed upon the particular statutes there involved. In the first, it was that each of the two Councilmen provided for from a ward of a city might not go out of office at the same time, the second presented the same question as to three prison directors.

In the case of *Baker, (Governor,) v. Kirk*, it is clearly implied by the language of the Court that the filling of a vacancy may be specifically provided for, so as to remove it from the operation of the general law before cited.

In speaking of the act relating to the election of prison directors, the learned judge says: "The Legislature seems to have framed the law in view of the seventh section above quoted, for it does not specify the time for which a person shall be elected to fill a vacancy, but leaves it to the general law."

We believe the language used in the act before us, clearly

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indicates a legislative intention to take the case of the election of Judges of Criminal Courts out of the general law, and provides that when elected they shall be "entitled to serve for the term of four years from, and after their respective elections."

We are strengthened in this view from the fact that it has been distinctly held, that the general provision heretofore cited, (*Sec. 7, 1 G. & H., page 672*) is not of universal application. See *The Governor v. Nelson, 6 Ind., 497.*

The conclusion to which we have arrived, is, that the Hon. George Holland, by virtue of his election by a popular vote of the people at the regular October election in 1870, is entitled to hold the office of Judge of the Wayne Criminal Circuit Court for the period of four years from the date of his commission; and that there was no vacancy in said office at the time the plaintiff claims to have been elected.

The writ of mandate was, therefore, rightly refused, and the judgment must be affirmed.

IN GENERAL TERM, 1873.

ALONZO BLAIR v. JACOB N. BUSER, Appellant.

PROMISSORY NOTE—*payee, maker, endorser, consideration—*
EVIDENCE—*introduction and order of.*

Testimony to show fraudulent representations on the part of payees of a note to the maker, is irrelevant and inadmissible against the holder of a note for value, purchased before maturity. Though the maker of a

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note payable in bank may have a valid defense to it, as against the payees, yet a *bona fide* endorsee for value may recover upon it. It is only where want of consideration is proved, or its execution was procured by fraud, that the *onus* of proving value paid, and purchase before maturity, is cast upon the holder.

It is ordinarily within the province of counsel to arrange the order of time for the introduction of evidence, but it is the discretion of the Court, that all causes may be proceeded with, "speedily and without delay," to so control the order of proof as to require the observance of the principle of law, that where a fact is necessary to be proved to render subsequent evidence relevant, such fact shall first be established in evidence, without reference to order of time or connection with other testimony. Hence, where in a suit by the endorsee fraud is alleged to have been practiced on the maker of a promissory note, the Court may refuse to hear evidence touching such alleged fraud, until some evidence is given bringing knowledge of it home to the plaintiff, before his purchase of the note.

Barbour & Jacobs, for appellant.

Hord & D., (Shelbyville) for appellee.

NEWCOMB, J.—The plaintiff, as endorsee of *Wing & Vandusur*, sued the defendant on a promissory note payable at the First National Bank of Indianapolis.

The complaint alleges that the note was endorsed to plaintiff for value, by the payees, before maturity, and that the same was duly protested for non-payment.

The defendant filed the general denial and five special answers. Before going into trial he withdrew the general denial and rested his defense on the affirmative answers.

There was a verdict for the plaintiff, and judgment was rendered thereon over defendant's motion for a new trial.

In his third answer the defendant pleaded that the note was given for a patent right for a bag-holder of which the payees were the owners, and that the agent of *Wing & Vandusur* made certain false and fraudulent representations whereby defendant was induced to purchase said patent right for certain specified territory, of all of which plaintiff had notice when the note was endorsed to him, &c.

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To this answer the plaintiff filed a general denial.

There are various errors assigned, but as one only is noticed in the appellants' brief, we confine ourselves to the question raised by that assignment.

On the trial at Special Term, the defendant was a witness in his own behalf, and testified that the note was given for the patent bag-holder described in his answer. Divers interrogatories were then propounded to him by his counsel as to the alleged fraudulent representations of the payees to induce him to sign the note. The plaintiff objected to the introduction of the proposed evidence, for the reason that it was irrelevant, and inadmissible, unless it should also be shown that the plaintiff became the owner of the note after its maturity, or without paying value therefor, or with notice of the alleged defense. The defendants counsel then stated that they declined to say what further facts they expected to prove. Thereupon the Court remarked that it would be useless to consume time by introducing evidence tending to show fraud on the part of the payees of the note, unless it was the intention to introduce evidence to show one or the other of the facts indicated by plaintiff's counsel in his objections; but if counsel for the defendant would say that they expected to introduce evidence tending to prove either of said facts, the objection would be overruled, otherwise it would be sustained. To this the defendant's counsel responded, that at that stage of the case they declined to make any statement of what they intended to prove; whereupon the Court sustained the objection to the several questions bearing on the fraudulent procurement of the note by the payees, to which ruling the defendant duly excepted.

The note in suit being payable in a bank in this State, a *bona fide* endorsee, for value, would be entitled to recover upon it, notwithstanding the maker might have a valid defense to it as against the payees. The rule is well estab-

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lished by numerous authorities, that where a want of consideration for negotiable paper is proved, or that its execution was procured by fraud, the law casts upon the holder the *onus* of proving that he gave value for it, and that he purchased before maturity. *Harbison v. The Bank of the State, 2 Ind.*, 133; *Bailey v. Bidwell, 13 M. & W.*, 73; *Sistermans v. Field, 9 Gray*, 331; *Tucker v. Morrill, 1 Allen*, 528; *Hurt v. Potter, 4 Duer*, 458; *N. Y. & Va. Stock Bank v. Gibson, 4 Duer*, 574; *1 Parsons on Bills and Notes*, 188; *Harvey v. Towers, 4 E. & L., Eng.*, 531.

The form of the issues in the present case relieved the plaintiff from proving that he gave value for the note, or that he purchased it before due. These facts were averred in the complaint, and not being denied, stood as admitted. The only issues were, was the execution of the note procured by the fraud of the payees, and had the plaintiff notice of the fraud when he purchased it? On each of these issues the burden of proof rested upon the defendant. To prove the fraud could avail him nothing, unless he brought notice of the fraud home to the plaintiff. It did not devolve on the plaintiff in the first instance to establish the negative of the defendant's averment that he had such notice.

Such being the issues, had the Court authority to require an assurance, or statement from defendant's counsel that they would follow up the proposed proof of the fraud charged by evidence of notice thereof to plaintiff, before he became the owner of the note?

It is a general rule of practice in this State, that the order of time for the introduction of evidence in support of the different parts of an action or defense, must be left to the discretion of the party introducing the evidence. *Throgmorton v. Davis, 4 Blackf.*, 174; *Rushville, &c., Railroad Co. v. McManus, 4 Ind.*, 275; *Hudden v. Johnson, 7 Id.*, 374; *Piatt v. Dawes, 10 Id.*, 60; *Fowler v. Hawkins, 17 Id.*, 212

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But this rule is not without qualification. In *Nordyke v. Shearon*, 12 Ind., 346, the Supreme Court held that the judge presiding at the trial might exercise some discretion in controlling the order of proof, for the purpose of expediting business, and preventing a waste of time. In that case the defendants pleaded as a set off, certain repairs on plaintiff's property. Having proved the repairs they proposed to prove that they were authorized by one Dugdale, and then to prove that the latter was the agent of the plaintiff. The Court required them to first prove the agency, and then that the agent authorized the repairs. This the defendants declined to do, and the evidence was not heard. On appeal the Supreme Court said: "We think in this the Court abused no discretion. If Dugdale was not the agent, it was a waste of the time of the Court to hear evidence as to his ordering repairs. And it was no hardship to require the defendants to first prove his right to order them. Without such proof, the evidence as to his ordering them, had no relevancy to the case."

In *Goings v. Chapman*, 18 Ind., 194, the like doctrine is held. One item in the plaintiff's account was an order given by defendant to plaintiff on one Neff, "not accepted by said Neff." At the trial the plaintiff offered the order in evidence, but the defendant objected, on the ground that plaintiff had not proved a refusal by Neff to accept the order, and the Court refused to admit the evidence unless the plaintiff would first prove a presentation to Neff and his refusal to accept. The Supreme Court sustained this ruling, on the ground that "the order, unless it was presented to the drawee for payment, constituted no valid demand against the drawer, and without proof of such presentation, could not be held effective as evidence in the case, and was, therefore, irrelevant."

The principle asserted in these cases is, that where a pre-

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vious fact is necessary to be proved to render the offered evidence at all relevant, such fact must be first proved.

It may not be logically correct to say that in the case at bar the notice was the prior fact to be established, as the natural order would seem to be to first prove the fraud; but proof of notice was as essential as the proof of fraud, and there was no hardship, or injustice in requiring the professional word of defendant's counsel that they would, after making their proof on the question of fraud, introduce evidence of plaintiff's knowledge of the fraud. Had the defendant's counsel asserted that they had no evidence to offer on the latter point, it would scarcely be claimed that the court was, nevertheless, bound to waste its time in hearing evidence on the question of fraud. And we think the refusal of counsel to state whether or not they had, and would produce evidence of notice, might reasonably be regarded by the court as an admission that no such evidence would be offered.

Under such circumstances a court is under no obligation to consume time in receiving evidence that in the end must prove worthless to the defense. If the defendant had no evidence to sustain his allegation of notice, he was not injured by the refusal of the court to hear the evidence on the charge of fraud, and therefore has no cause of complaint. If he had such evidence it was easy for him to say so, and that was all that the court required as a prerequisite to the admission of the rejected testimony.

The judgment at Special Term is affirmed with costs.

NOTE.—*Consideration 10 American Law Register, 844:*

The fact that the purchaser of the assets was induced to enter into the agreement by false and fraudulent representations of the other partner respecting the partnership assets, is no defense to an action upon the note by a *bona fide* holder, so long as the agreement stands, and the defendant

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retains the property transferred without offering to re-assign the same, or demanding a return of the note. 58 Barb., *Springer v. Dwyer*.

Where the endorsee of a note produces it on the trial, it is to be presumed he is the holder in good faith, and that he received it before maturity. If the defendant alleges the contrary, the burden of proof is upon him. 58 Barb., *Springer v. Dwyer*.

10 *American Law Register*, 762.

"A negotiable note transferred before due in the regular course of business to a creditor, in payment of, or as security for a pre-existing debt, taken in good faith and for a valuable consideration, is collectable in the hands of the creditor, notwithstanding any equities existing as between the original parties thereto. 11 Conn., 388; 29 *Id.*, 479. See also, 1 *American Law Register*, (N. S.) 85. Fraud is not available as a defense in cases of this character."

The fundamental principle of the law, applicable to negotiable paper, is that it is the representative of money, and may be used in all mercantile transactions as money, or as its substitute.

"The tendency of the law in respect to the legitimate uses of negotiable paper, is thus referred to in 1 *Parsons on Notes and Bills*, 257,—"that whether negotiable paper is sold or discounted, or endorsed over to pay a new debt, or for a new purchase, or to secure a new debt, or an old debt, or to pay an old debt, it becomes in each case the property of the holder, and carries with it all the privileges of negotiable paper, unless there be something in the particular transaction which is equivalent to fraud, actual or constructive."

In a note to this case, Redfield says: "It is common, and entirely in the due course of business to endorse a note, or bill in payment, or as security for a pre-existing debt, and such an endorsement of negotiable paper before due, will exclude equitable defenses.

The cases are collected and classified in *Atkinson v. Brooks*, 26 *Vt.*, 569, and the note to *Le Breton v. Pierce*, 1 *American Law Register*, (N. S.) 85.

As between the original parties to a note a failure of consideration is a good defense to an action brought on the note. *Britton v. Hall*, 1 *Hill*, 528.

If the action is brought by the endorsee of the note, and there is no evidence impeaching his title, proof of failure of consideration is inadmissible. *Same*.

If negotiable notes and bills come into the hands of a third person in good faith, and for value, without any notice of any defect or title, or of circumstances that should create suspicion, he obtains a good title. *Belmont Branch Bank v. Hoge*, 7 *Bosw.*, 548; 85 *N. Y.*, 5 *Tiff.*, 65; *S. C.* affirmed.

A party who has a debt due him, and who takes in payment a bill, or note not due, thus extending the time of collecting his debt, until such bill,

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or note matures, is a holder for value. *Superior Court, Burns v. Rowland*, 40 Barb., 868.

Subsequent Notice.—A *bona fide* holder of a bill, or note, who takes the same with no other knowledge than the paper furnishes, has the right in all cases to treat the parties thereto, as liable to him, in the same manner and order, and to the same extent as they appear on the instrument—any knowledge acquired by him, at a subsequent period has no effect. *Hoge v Lansing*, 35 N. Y., (8 Tiff.) 136.

A party who takes a bill of exchange, or negotiable promissory note for value, before maturity, with knowledge of the consideration of the same, but without notice of the failure of such consideration, is entitled to recover thereon. *Davis v. McCready*, 4 E. D. Smith, 565. *S. C. affirmed.* 17 N. Y. (3 Smith), 230.

It is no defense to an action against the maker of a promissory note by an indorser for value, that the note was made for the accommodation of the payee, and was received by the plaintiff with knowledge of that fact. *Pettigrew v. Clave*, 2 Hill, 546.

The transfer of negotiable paper to a *bona fide* purchaser, for value, before maturity, gives a perfect title, which will pass to a subsequent purchaser, having notice that the original consideration was fraudulent. *Shell v. Tetford*, 4 N. Y. Leg., Obs., 307.

One who buys a negotiable instrument for value in good faith, and before maturity, takes it free from equities existing against the payee. *Smith v. Babcock*, 2 Wood., C. & M., 246, 287; 3 McLean, 517; 4 McLean, 427; 2 Wall., 110, 121.

A *bona fide* holder of a negotiable instrument for a valuable consideration without any notice of facts which impeach its validity, as between antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although between the antecedent parties the transaction may be without any legal validity. And the holder of any negotiable paper, before it is due, is not bound to prove that he is *bona fide* holder for a valuable consideration without notice, for the law will presume that, in the absence of all rebutting proofs. 16 Pet., 1; 20 Howard, 343, 365.

Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. 2 Wall., 110, 121.

Where it is proposed to impeach the title of a holder for value, by proof of facts, and circumstances outside of the instrument itself, it must be shown that he had knowledge of such facts and circumstances at the time the transfer was made. 18 Pet., 65; 14 Pet., 318; 3 T. R., 80; 4 Mass., 270; 12 Johns., 305; 12 Pick., 345; 20 Howard, 343, 365; 5 Wend., 566.

In 1 *American Law Register*, 745: * * that express or actual notice

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that the note was without consideration, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character, as necessarily to cast a shade upon the transaction, and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties, but if the transfer of the note was attended with such circumstances as to put the taker on his guard, or if he must have known therefrom that the person offering it had no right to transfer it, then he was bound to make inquiry.

Sec. 171, 2 Greenleaf, 151. But, on the other hand, no defect, or infirmity of consideration, either in the creation, or in the transfer of a negotiable security, can be set up against a mere stranger to the transaction, such as a *bona fide* holder of the bill, or note, who received it for a valuable consideration, at, or before it became due, and without notice of any infirmity therein.

The same rule will apply, though the present holder has such notice, if he derives his title to the bill from a prior *bona fide* holder for value.

Every such holder of a negotiable instrument is entitled to recover upon it, notwithstanding any defect of title in the person from whom he derived it; even though he derived it from one who acquired it by fraud, or theft, or robbery.

In a suit by the assignee of a promissory note against the maker, the defendant is estopped to set up the invalidity of the note, as between himself and the payee, if the plaintiff purchased the note upon the promise of the defendant to pay it. 1 *Blackf.*, 248; 1 *Ind.*, 280; 8 *Ind.*, 501; 11 *Ind.*, 1, 112.—REPORTER.

Cosby v. Adams.

IN GENERAL TERM, 1873.

RICHARD M. COSBY v. JOHN W. ADAMS, Appellant.

*CONTRACT—for building, interpretation of—work and material
for, part performance of—possession under.*

SPECIAL FINDING—

Where a written contract for building a house contained provisions that the work should be done according to the directions, and instructions of the architect, and that the last payment should only be due when the building was completed, according to the plans, and specifications, to the satisfaction of the owner of the building, and of the architect by him employed, and the production of a certificate from the architect to that effect; and further, that if any dispute arose in regard to the true meaning of the drawings, and specifications, or the agreement, or as to the quality of the work, or materials, it was to be decided by the architect, whose decision should be final,

Held: That the architect had authority to bind the owner of the building by directing such changes, or alterations as were found, in the progress of the work to be beneficial, or necessary.

Held: That the agreement to submit matters of dispute to the architect was binding upon the parties.

Held: That the owner of the building had a right to demand the certificate of the architect as evidence of the completion of the building, before making the final payment.

Held: That if the contractor applies to the architect for the certificate, and he obstinately, or unreasonably refuses to furnish the same, the contractor may establish his right to recover by other evidence.

Held: That the production of the certificate may also be waived by the owner of the building, or by mutual agreement of the parties, and such waiver may be shown by direct evidence, or it may be implied from the acts of the parties.

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Where the contractor sues in such case for work and labor done, and materials furnished in erecting the building, and not upon the special contract, if he makes out a case where he is entitled to recover, notwithstanding the written contract, which is set up in answer, the production of the certificate of the architect, or showing a demand, and refusal of the same, is not a pre-requisite to his recovery.

A part performance of that portion of the contract, dependent upon the production of the certificate of the architect, by the owner of the building without objection, or protest, tends to show a waiver of the production of the certificate.

Where it is shown that the owner of the building, while the work was in progress, accepted a portion of it by taking possession of, and occupying it, and afterwards took possession, and occupied the balance, thus deriving benefit from the labor of the contractor, he cannot refuse to pay the reasonable value of the labor done, and for the materials, though the written contract was not in all things complied with.

Where special findings of a jury, in answer to interrogatories, do not embrace all the issues, and other facts might have been found from the evidence that would sustain the verdict, a motion for judgment on such findings should be overruled.

Gordon, Lamb & Browne, Bradbury & Bloomer, for appellant.

Taylor, Rand & Taylor, for appellee.

BLAIR, J.—This is a suit by the plaintiff to recover for work and labor done, and materials furnished in erecting a dwelling house for the defendant, and to enforce a mechanic's lien.

The defendant answered in five paragraphs :

The first is a general denial.

The second alleges that the work was done, and materials furnished under a written contract, which is made a part of the answer, and that the defendant has paid all that was due the plaintiff by the terms of the contract ; that the last payment was only due upon the completion of the building, according to the plans and specifications, to the satisfaction of the defendant and the architect, and the production of a certificate from the architect to that effect. The answer fur-

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ther alleging that the building was not completed by the time agreed upon; that the plaintiff abandoned it in an unfinished condition, and has not procured, and cannot procure the certificate of the architect; and that the amount paid on the contract more than pays the plaintiff for the work done and material furnished.

The third paragraph is in the nature of a cross complaint, or counter claim, setting out the written contract as before. It is alleged that the work was to be done for \$3,613 of which sum \$1,913 was to be paid by the defendant on demand, and when the work was done according to the contract, and the certificate of the architect produced, a note on one Reed for \$1,000, and \$700 in cash was to be paid; and that the plaintiff has not complied with his contract by finishing the house within the time agreed upon; that it is not yet completed, but was abandoned by the plaintiff in an unfinished condition; that the work was not done in a workmanlike manner, nor to the satisfaction of the architect; that the defendant has paid the \$1,913. and delivered the Reed note to the plaintiff, and has paid cash, and goods to the amount of \$70.50, and for work done in completing the building \$190.73, and that there yet remains certain work to be done, and changes made, to the value of \$1,000, in order to complete the building according to the contract.

The fourth paragraph is a plea of payment.

The fifth is a set-off for goods, &c.

The plaintiff replied in seven paragraphs.

The first is a general denial of each paragraph of answer.

The second is to the second paragraph of answer, and avers that the written contract was departed from, and the plan of the house changed, and a large portion of work done was beyond the terms of the contract, all of which was with the knowledge, and consent of the defendant.

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The third reply is a general plea of performance of the written contract.

The fourth paragraph alleges that the specifications were not in existence at the time the written contract was made, but were prepared afterward, and were different from the work as represented to the plaintiff it was to be, at the time the contract was made.

The fifth is, that the indebtedness set up in the fifth paragraph of the answer has been paid.

The sixth is, that the delay in completing the building was occasioned by negligence of the defendant in delaying plans, and other work, and that the house was completed before suit was brought.

The seventh alleges that the architect refused to act as referee, and was so prejudiced against the defendant as to be unfit to act as umpire, and the plaintiff could not procure his certificate.

The written contract, which is made a part of the answers referring to it, contains the following provisions :

The defendant agrees to perform all the work "mentioned, and contained in the accompanying specifications, as modified, and explained on pages 17 and 18, and which includes all carpenter work, lumber, hardware, tin-work, and roofing, and according to the drawings prepared, and referred to, and according to the directions, and instructions, and explanations of the architect employed by the said J. M. Adams, at, and for the sum \$3,613," of which sum \$1,193 is to be paid when demanded by the plaintiff Cosby; "and when the work is completed, and on the certificate of the architect, a note made by J. B. Earl Reed for \$1,000, and seven hundred dollars in cash, shall be paid on final settlement."

The work to be completed in a workmanlike manner by the 12th of June, 1872, "to the entire satisfaction of the owner, and the architect employed by him, and in case of any dis-

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pute arising in regard to the true meaning, or intent of the drawings, specifications, or this agreement, or in regard to the quality of work, or material used, or to be used in said contract, the same shall be decided by the architect, whose decision shall be binding, and conclusive between the parties."

The agreement concludes as follows: "For the faithful performance of all the articles, and agreements before mentioned, the said J. W. Adams, and R. M. Cosby, parties to the first, and second part as aforesaid, do hereby severally bind themselves, their executors, administrators and, assigns, each to the other, in the penal sum of \$2,000, firmly by these presents."

Signed by,

J. W. ADAMS,
R. M. COSBY.

The specifications and drawings are too lengthy for insertion here, and will only be referred to, as may be necessary, in passing upon the points in review.

The evidence both of the plaintiff and defendant shows that several items of extra work was done, and additional materials furnished by the plaintiff. The defendant Adams admits in his testimony that he authorized some items of this character. The evidence of the architect shows that other items were authorized by him, and the testimony of the plaintiff, and his witnesses, shows still other items. It is urged that the architect had no authority from the defendant to enlarge the contract by directing, or agreeing to extra work. The architect is shown by the contract to be in the employ of the defendant, and by the terms of the contract, the work was to be prepared, "according to the directions, and instructions, and explanations of the architect." In view of this clause in the written contract, the defendant cannot say that the architect had no authority to direct such changes, and alterations as were found to be necessary, or

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beneficial in the progress of the work. This view is further strengthened by the fact that changes were made by the architect, to which the defendant either expressly assented, or acquiesced. In such case, how could the plaintiff know when the authority of the architect ceased, or how far it extended, unless notified by the defendant; and the evidence does not show that any such notice was given.

The evidence is voluminous, and in many particulars contradictory.

It is urged that because the plaintiff never procured the certificate of the architect, or does not show that he demanded it, he cannot recover, and is not entitled to maintain the suit.

The jury, in answer to interrogatories, found that no such certificate had been furnished, or demanded by the plaintiff.

The evidence shows that during the progress of the work, trouble arose between the plaintiff, and the architect, and at one time it would seem that work was suspended on that account. The character of the trouble, and cause of the suspension does not appear from the evidence.

The plaintiff, defendant, and the architect, met at the office of the latter, and it was there agreed that the work should again proceed under the care of a Mr. Parks, as superintendent, in the employ of the plaintiff. Under this agreement the work proceeded.

That disputes arose about the work, &c., is evident from the testimony; but there is no evidence pointing out any special matters of dispute, that were ever decided by the architect, or that was referred to him for decision under the terms of the contract. It is not shown that either party refused to abide by the decision of any matter submitted, or referred to the architect, or that either party refused to submit any matter of dispute to the architect.

The trouble between the architect, and the plaintiff was evidently of such a character, that there was no good feeling on the part of either toward the other; and there is evidence

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tending to show that the architect did not want the plaintiff to come about the building, and they did not on any occasion seek each other's company. That there was one mistake in the plans, or specifications, that caused extra labor on the part of the plaintiff, is admitted by the architect, who attempted to excuse himself by saying it was a mistake of his clerk. That there was fault on both sides, is perhaps true.

On the final certificate of the architect, the note on Reed, and cash in the sum of \$700, was to be paid to the plaintiff.

The authorities cited by the defendant show that the agreement made by the parties was one which was binding upon them, and the defendant had a right to demand as evidence of the completion of the work, the certificate of the architect. *Smith v. Brady*, 17 N. Y., 173; *The United States v. Robeson*, 9 Peters, 319.

These cases however show, and the rule is, that if application is made to the architect for the certificate, and he absolutely, or unreasonably refuses to certify, the plaintiff may establish his right to recover by other evidence. It is a condition that may also be waived by the party for whose benefit it was made, or by the mutual agreement of the parties. This may be shown by direct evidence of such agreement, or waiver, or may be implied from the acts of the parties.

There is no evidence showing such an agreement of the parties. Nor is there any evidence showing a demand on the part of the plaintiff for the certificate. The architect says if demand had been made he would not have given it. A demand would therefore have been useless. The defendant therefore lost nothing by the failure on the part of the plaintiff to make a demand, and has shown by his own witnesses, that a demand would not have led to a settlement of the matters of account, and the plaintiff has therefore sought to establish his claim by evidence other than by the certificate of the architect. As the complaint is upon a common count

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for labor done, and materials furnished, and not upon a special contract, if the plaintiff made out a case where he is entitled to recover on the complaint, notwithstanding the written contract set up in answer, the production of the certificate of the architect, or showing a demand for it and a refusal, is not a prerequisite to his recovery. The whole question was submitted to the jury, under the issues joined by the parties.

The evidence shows that the defendant took possession of a part of the house before the other portions were completed, and there is also evidence tending to show that in consideration of getting possession of a part of it, the defendant gave the plaintiff further time to complete the other portions. The evidence does not show when the other portions of the house was occupied, or taken possession of by the defendant.

The evidence further shows that the note of Reed for \$1,000 was delivered to the plaintiff; but the time when, is not disclosed. By the terms of the agreement the defendant was under no obligation to deliver it until the certificate of the architect was produced. The evidence does not show that there was any claim made by the defendant at the time the note was delivered, that the contract was not performed, or any declaration on his part that he would withhold the payment of the \$700, on account of the certificate not having been furnished. Here, then, was a part performance by the defendant of that portion of the contract dependent upon the production of the certificate, without any objection, or protest, and this would tend to show a waiver of the production of the certificate.

We will consider in this connection the third instruction asked by the defendant, which was refused by the Court. This instruction, after reciting the terms of the contract, is as follows: "Upon this written contract I instruct you that in order to maintain this action, it was necessary for the

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plaintiff to complete the work according to the terms of the contract, and procure from the architect a certificate that the work was completed to his (the architect's) acceptance. But if the plaintiff completed the work according to the contract, and applied to the architect for a certificate, and the architect wrongfully, or fraudulently withheld the certificate, then it would not be necessary to the maintenance of this action."

This embodied the theory of the defendant, and professes to cover the entire right of the plaintiff to recover. The action, as before stated, is upon a common count on work and labor, and materials furnished.

There was evidence tending to show that the workmanship was not good, and was not in accordance with the specifications. This was met by other evidence tending to show that the work was well done, and specifications complied with.

That there was extra work done is clear, but as to the amount, and value of it, the evidence is quite contradictory. There was also evidence tending to show that some work was left undone.

Again, the evidence showed, as before stated, that the defendant while the work was in progress, accepted a portion of it by taking possession of, and moving into a part of the house, and afterwards he took possession of the balance, thus deriving benefit from the labor of the plaintiff. In such case, he could not refuse to pay the value of the plaintiff's labor, and materials furnished, though the written contract was not in all things complied with. *Wolcott v. Yeager, et al.*, 11 Ind., 84; *Kerstetter v. Raymond*, 10 Ind., 199; *McClure and others v. Secrest*, 5 Ind., 31; *Wheatley v. Miscal*, *Ib.*, 143; *Persons v. McKibben*, *Ib.*, 26; *Coe v. Smith*, 4 Ind., 79; *Major et al. v. McLester*, *Ib.*, 591; *McKinney v. Springer*, 3 Ind., 59; *Lomax v. Bailey*, 7 Blackf., 599.

This right of the plaintiff to recover, if he accepted the

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work, though it was not done in accordance with the written contract, is entirely ignored by the instructions asked by the defendant; and it was, therefore, rightly refused.

The first, and second instructions given by the Court, we believe to contain correct statements of the law applicable to the issues, and the evidence. These instructions left the question of the waiver of the certificate of the architect, the acceptance of the building, and work of the plaintiff, by the defendant, as well as whether the certificate was unreasonably refused, to be determined from the evidence as questions of fact. They also covered the questions presented about extra work, failure to complete the house in the time agreed upon, and damages to the defendant on account of all alleged failures, on the part of the plaintiff, to comply with the contract.

The Court cannot disturb the finding of the jury upon these questions, nor can we say, from the evidence, that the evidence that the damages are excessive.

The special findings of the jury in answer to interrogatories, do not embrace any questions relating to the acceptance of the building by the defendant, or any waiver on the part of the defendant, or unreasonably withholding of the certificate of the architect; and hence, as they do not cover all the issues, and other facts might have been found from the evidence that would sustain the verdict, the motion for judgment on the special finding was rightly overruled.

The judgment is, therefore, affirmed.

Hill v. Donaldson.

IN GENERAL TERM, 1873.

GEORGE W. HILL, Appellant, v. CLAIBORNE L. DONALDSON.

ERROR—*assignment of*—
EXCEPTIONS.

Though an exception is duly taken to the refusal of the Court to grant a new trial, yet if the ruling of the Court is not assigned for error, the alleged errors accruing on the trial below, and on which the motion for a new trial is based, cannot be considered on appeal.

Where it appears from the bill of exceptions, that no evidence was offered to a paragraph made the subject of demurrer, the ruling of the Court on this demurrer cannot be assigned for error, as the party demurring is not injured thereby.

E. A. Parker, for appellant.

Hanna & Knefler, for appellee.

NEWCOMB, J.—The plaintiff sued to enforce a mechanics' lien on the real estate of the defendant, to discharge an alleged indebtedness of one Jacob Coffman to plaintiff, for lumber furnished the former, and used in the construction of a dwelling house, erected by Coffman for the defendant.

There was a jury trial, a finding for the defendant, and judgment in his favor over plaintiff's motion for a new trial.

The plaintiff appealed to the General Term, and assigned the following errors:

1. The overruling of plaintiff's demurrer to sixth paragraph of defendant's answer.

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2. The refusal of the Court to permit the plaintiff to prove certain items of his lumber account.

3. That the verdict is not sustained by sufficient evidence.

4. That the verdict was contrary to law.

5. That the charge of the Court was error in law.

None of these assignments, save the first, present any questions of law on appeal. They were proper grounds for a motion for a new trial, and were presented as such at Special Term.

An exception was duly taken to the refusal of the Court to grant a new trial, but that ruling is not assigned for error. We cannot, therefore, consider these alleged errors occurring at the trial.

Whitinger v. Nelson, 29 Ind., 441; *Herrick v. Bunting*, *Ib.*, 467; *Smith v. Crigler*, *Ib.*, 516; *Lingerman v. Nave*, 31 *Ib.*, 222; *Stillwell v. Chappell*, 30 *Ib.*, 72.

There is a bill of exceptions in the record, setting out the evidence given on the trial of the cause; and it appears from the bill of exceptions that no evidence was given or offered in support of the sixth paragraph of the answer, consequently it is not necessary to decide as to the correctness of the ruling on the demurrer to that paragraph, as it is manifest that the plaintiff was in no respect injured thereby.

The judgment at Special Term is, therefore, affirmed, with costs.

Sigler v. Coder and Carpenter.

IN GENERAL TERM, 1873.

JAMES SIGLER v. N. B. CODER AND IRA H. CARPENTER,
Appellant.

CHOSE IN ACTION.

A *chose-in-action*, or any specific article, other than money, to operate as payment of a debt, it must be affirmatively shown that it was received by the creditor upon an express agreement that it should so operate.

No agreement can be implied from the simple reception of a note, acceptance, or other promise by the creditor that such is taken as payment, or extinguishment of an original debt.

McDonald & Butler, for appellant.

Test, Burns & Wright, for appellee.

PERKINS, J.—Sigler sued Coder and Carpenter on a bill for lumber delivered to them as partners. Coder made default. Carpenter answered, that the partnership had been dissolved, and that after its dissolution Sigler received from Coder some money, and Coder's individual acceptance, payable at a bank, at thirty days, in full payment of the bill for the lumber, whereby he, Carpenter, was discharged from liability on the bill. The plaintiff replied in denial. The cause was tried by the Court. Finding for the plaintiff, and judgment accordingly.

The Court made a special finding of facts, and stated its conclusions of law thereon. The defendant excepted to the conclusions of law, and moved for a new trial on the ground

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that the finding of facts was not justified by the evidence. The motion was overruled, and a bill of exceptions presents the evidence to this Court.

The facts found by the Court, so far as they are material to the questions to be decided in this appeal, are substantially these: That on the 25th day of October, 1871, the plaintiff, who resides at Greencastle, Indiana, shipped to the defendants, then partners, and residents of Indianapolis, at their request, the lumber for the price of which this suit was brought; that the lumber was received by the defendants on the 27th of October, two days after its shipment; that the partnership between Coder and Carpenter, defendants, was dissolved on the 2d day November following. The special finding proceeds:

“ On the 30th day of November, 1871, the plaintiff called at the office formerly occupied by Coder & Carpenter, at the city of Indianapolis, to demand, and receive payment for the lumber, and he was there informed by the defendant Coder that his money had been sent to him at Greencastle, whereupon the plaintiff returned home, and instead of money he found the acceptance of the defendant, N. B. Coder, of a draft at thirty days sight, payable at Woollen, Webb & Co.'s Bank, Indianapolis, Indiana, for the sum of three hundred and sixty-one dollars and sixteen cents, the amount due on the lumber, five dollars having previously been paid the plaintiff thereon. The plaintiff then signed the draft, and indorsed it for collection to the Farmers' Bank, Greencastle, Indiana. After the expiration of the thirty days, the acceptance was returned to the plaintiff protested for non-payment.

Afterwards, on the 9th day of January, 1872, the plaintiff's agent called at the same place, with the protested acceptance, and demanded payment for the lumber, whereupon the defendant, Coder, made some objections about the lumber not having been properly culled, and claimed some reduc

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tion from the amount, and the plaintiffs agent, without authority from the plaintiff, agreed to receive three hundred and forty-five dollars in payment for the lumber, and the defendant, Coder, agreed to pay the said sum, and promised to meet the said agent at the Sherman House, in Indianapolis, and pay him the money on that same day, prior to the departure of the regular train for Greencastle; the defendant Coder did not meet the agent by the time agreed on, but afterwards on the same day, he came, and paid the agent of plaintiff one hundred and forty-five dollars, and tendered him an acceptance of a draft by N. B. Coder for two hundred dollars, one month after date, (January 9th, 1872,); the agent of plaintiff refused to take the acceptance, but on Coder assuring him that it would be paid promptly, he took the draft and delivered it to the plaintiff, who signed it and indorsed it to the Farmers' Bank as before. The draft was never paid by the defendant Coder, but was returned protested after the expiration of the month. The agent of plaintiff had no authority from plaintiff to receive the acceptance of Coder in payment for the lumber.

There was no express agreement by the plaintiff, and defendant, or either of them, that the acceptances of Coder should be taken as payment of the original debt, and in discharge thereof. On the foregoing facts the Court finds as conclusions of law, that no agreement can be implied, that the acceptance of Coder was received by the plaintiff in discharge of the debt, and that the plaintiff is entitled to recover of the defendants Nathaniel B. Coder, and Ira H. Carpenter, the sum of two hundred and sixteen dollars and sixteen cents."

Is this finding of the Court on the facts correct? Are the conclusions of law upon the facts correct? It is very clear that the evidence discloses no express agreement to receive the acceptances as payment. Nor does it show any con-

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sideration, either by way of profit to Sigler, or loss to Carpenter for the release of the latter. The acceptances were worked into the plaintiff's hands against his desire, and by a sort of imposition. All he did with them was to hold them till due, to ascertain if they would produce payment of his demand. It is well settled, that no agreement can be inferred from the simple reception of a note, a promise to pay, that such note, or promise is taken as payment. And it is equally well settled that the reception of a note for a debt due, does not operate as payment, unless it be agreed that it shall so operate.

Money is the only legal tender for the payment of money debts, and the only thing that operates *per se* as payment. Hence, if it is claimed that a chose-in-action, or any specific article, other than money, has operated as payment of such debt, it must be affirmatively shown that it was received by the creditor upon an agreement that it should so operate.

In *Frisbee et al. v. Lindley, &c.*, 23 Ind., on p. 517, the Court say, "The receipt of the bills on Pierce by the plaintiff, did not, of itself, constitute a payment on the bill sued on; but to have that effect they must have been accepted as such payment."

In *Huntington v. Colman*, 1 Blackf., 348, the Court uses this language: "The cancelling of one obligation for the purchase money, by the giving of another, would not be a payment of the money. The obligation to pay the money stands so far independent of the evidences of that demand, that they may be varied from time to time, and not affect the obligation itself. So that the Court would not have instructed the jury, that the taking up of the original note for the purchase money, and the giving of another for the balance then due, was an actual payment of the money."

So in *Kiser v. Ruddick*, 8 Blackf., on p. 385, Judge Smith, citing authorities, says: "A creditor may accept notes, or

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other choses-in-action, either in payment, or for better security only, but the delivery of such choses-in-action is not payment unless they are received as such, or produce payment." See, also, *Louden v. Birt*, 4 *Ind.*, 566. The unsettled question on this subject has been, and now is, not whether there must be an agreement, that a chose-in-action given for a debt, shall operate as payment, in order that it may have that effect, but as to the kind of an agreement necessary in such case, that is, whether the evidence must show an express agreement, or only circumstances, and acts from which the agreement may be legally inferred. Courts in different States differ on this point. Judge Sharswood, in his edition of *Biles on Bills*, top p. 284, collects the conflicting cases. Much the larger number sustain this proposition as laid down by him:

"A bill of exchange, or promissory note, either of a debtor, or any other person, is not payment of a precedent debt, unless it be so expressly agreed."

See, also, *Elwood v. Deifendorf*, 5 *Barb.*, (N. Y.) *R.*, a strong case to the same effect.

We do not find that this precise point has been ruled upon by our Supreme Court, except in a single case; that of *Tyner v. Stoops*, 11 *Ind.*, 22. In that case the Court hold that the contract must be express. In the case at bar, then, as there was no express agreement, and no facts proved, on which even an implied agreement could reasonably be found, there can be no doubt of the correctness of the judgment below, and it must be affirmed.

Affirmed.

NOTE.—See *Smith's Mercantile Law*, p. 347, *et seq.*, and notes on subject. 1st. *Of suspension*. 2d. *Extinguishment*. 3d. *Satisfaction*. 4th. *Discharge* on bills and notes. See, also, *Chitty on Contracts*, p. 788, *et seq.*, and notes; also, 1 *Blackf.*, 848, and notes.

Hill v. Armstrong.

IN GENERAL TERM, 1873.

GEORGE W. HILL, Appellant, v. WILLIAM S. ARMSTRONG.

EXCEPTIONS—*bill of*—
LIEN—*mechanics*.

No question is presented on appeal, as to the correctness of any finding, matter of evidence, or ruling, without it shall be brought up by a bill of exceptions.

It seems that where notice of a lien shows all existing indebtedness, and is silent as to any credit thereon, proof that a credit was given would be inadmissible.

E. A. Parker, for appellant.

NEWCOMB, J.—The complaint in this case, sets forth, that in the year 1871, defendant contracted with one Jacob Coffman to erect upon a lot of defendant, a certain dwelling house; that plaintiff sold and delivered to Coffman lumber and material for said house, which was used therein; that said lumber, &c., was sold to said Coffman upon a credit of ninety days; that the same was of the value of one thousand dollars, no part of which had been paid, and that on November 21st, 1871 and within sixty days from the date of the last delivery of material to Coffman, plaintiff filed in the Recorder's office of Marion county, his notice of intention to hold a lien on the lot, and building of defendant for the amount so due from Coffman, which lien was duly recorded, &c.

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The notice was set out in the complaint as follows :

INDIANAPOLIS, November 20, 1871.

Wm. S. Armstrong, and all others concerned :

You are hereby notified that Jacob Coffman, whom you employed to erect a dwelling house on lot four, and 28 feet north side lot 3, in Martindale's Central Addition to the city of Indianapolis, is indebted to me in the sum of one thousand dollars, on account of lumber furnished him, and which was used in the erection, and construction of said dwelling house, and that I hold you, and said property responsible to me for said sum of one thousand dollars ; said lumber so furnished, was furnished by me at the special instance, and request of said Coffman, contractor as aforesaid, and within the last sixty days.

Geo. W. Hill."

This notice was recorded November 21st, 1871, and the suit was commenced November 19, 1872. A demurrer to the complaint was overruled ; issues of fact were then found ; the cause was submitted to the Court for trial, and a special finding of the facts, and conclusions of law was had, and judgment rendered on such finding, in favor of the defendant.

The plaintiff excepted to the conclusions of law, and assigns the same as error.

The finding, after setting out the title of the cause, is as follows :

" I find in this case that Armstrong made a contract with Coffman to build him a house for a specified sum.

I find that Hill furnished Coffman lumber for the erection of the house, on which lumber so furnished, there is yet due, from Coffman to Hill, the sum of \$417.32.

I find that Hill filed a notice of intention to hold a lien on the house, so built for Armstrong, which notice, and the time of filing appear in the papers.

I further find, that at the time of filing said notice of lien, Armstrong had fully paid Coffman, the contractor, for the

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erection of said house—paid the contract price of the house, and all extras.

On this state of facts I find the law to be that Hill has no legal right to hold a lien on said house for said sum due him for lumber furnished to contractor Coffman. The judgment will, therefore, be for the defendant, and against the plaintiff for costs. S. E. PERKINS."

Assuming, as we must in the absence of a bill of exceptions setting forth the evidence, that the Judge trying the cause stated in his special finding all the facts that were proved, we entertain no doubt that his conclusions of law, upon the facts, were correct.

It was essential to a recovery, that the plaintiff should prove, in addition to the facts found:

1st. That he filed his notice of intention to hold a lien, in the Recorder's office, within sixty days "after the completion of the building, or repairs." 3 *Ind., Stat.*, 336, *Sec.* 650. The special finding fails to show that the notice was filed within the statutory time.

2d. That the lumber was furnished Coffin within one year previous to the commencement of the suit, or if a credit was given, within one year from the expiration of the credit. 3 *Ind., Stat.*, 337, *Sec.* 651. The special finding does not show that there was any evidence given on these points.

Indeed, it is questionable, whether proof that a credit was given would have been admissible in this case, inasmuch as the notice was of an existing indebtedness, and was silent as to credit having been given to Coffin on his purchase of the lumber in question. See *Wade v. Reitz*, 18 *Ind.*, 307.

No motion was made at Special Term touching the special finding; but a motion for a new trial was filed, which was overruled, and the plaintiff excepted. The evidence, however, is not brought before us by a bill of exceptions; consequently no question is presented, as to the correctness of

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the special finding on the facts. *Peden's, Administrator, v. King*, 30 Ind., 183.

The judgment at Special Term is affirmed, at the costs of the appellant.

IN GENERAL TERM, 1873.

SILAS B. MAULSBY, Appellant, v. GEORGE CHURCH.

COSTS.

Where a suit is commenced in the Superior Court, and the plaintiff shows that he is entitled to recover more than fifty dollars, but the defendant also shows, that he is entitled to a set-off to an equal amount, and judgment is rendered for the defendant, the costs should be taxed against the plaintiff.

BLAIR, J.—This is a suit by the plaintiff to recover damages caused by the unskillful sawing of timber, which the defendant had undertaken to manufacture into lumber for the plaintiff.

The defendant answered in general denial and a set-off, claiming compensation for sawing the same timber mentioned in the complaint.

There was a trial by the Court, and judgment for the defendant, and against the plaintiff for costs.

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A motion was then made by the plaintiff to tax the costs to the defendant, which motion was overruled, and excepted to by the plaintiff.

This question of costs is the only one presented for our consideration. There was no special finding of facts and conclusions of law under Section 341, 2 G. & H., p. 207; but the finding of the Court is stated as follows: "That the plaintiff is entitled to recover on his complaint \$84, and defendant on his set-off \$84, and therefore, finds for the defendant."

The statute establishes the general rule that the party recovering judgment shall recover costs. This rule always prevails unless it is otherwise provided by law. 2 G. & H., p. 225, Sec. 396.

The next section of the statute, 2 G. & H., p. 227, points out a different rule, in cases where the action is commenced in the Circuit Court, or Court of Common Pleas where the plaintiff recovers less than fifty dollars; except that in cases where "the judgment has been reduced below fifty dollars by a set-off, or counter claim, pleaded, and proved by the defendant, in which case the party recovering judgment shall recover costs."

It is claimed that as the finding shows that the plaintiff, but for the set-off, was entitled to recover more than fifty dollars, he was entitled to a judgment for costs.

We do not so understand the statute. It was made to prevent, or discourage parties from bringing petty suits in the higher courts, and the section is intended to cover a class of cases, where the plaintiff may have a valid, and just claim for fifty dollars, or over, for which he may sue, and if it should turn out on account of a set-off, or counter claim, "pleaded and proved by the defendant," that he is only entitled to a judgment for a sum less than fifty dollars, he will still be entitled to recover his costs. There must be a judgment in

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any event for the plaintiff in such case. If the claim of the plaintiff is more than balanced by a set-off, or counter claim, or if it is just equaled by a set-off, or counter claim, it shows that in justice, and equity the suit ought never to have been instituted, that the plaintiff is not entitled to recover anything of the defendant, and hence ought not to come into Court.

We think the action of the Court in taxing the cost to the plaintiff was right, and the judgment is affirmed.

IN GENERAL TERM. 1873.

HENRY W. MORRIS v. STEPHEN F. MAJOR ET AL., Appellant.

APPEAL.

An appeal may be taken to General Term, as it may now be taken from the Circuit, to the Supreme Court, and where it is shown by affidavit to be necessary for the protection of the rights of the parties, unless a bond is filed, proceedings below will not be stayed; but an appeal cannot be dismissed because a bond is not filed.

Dye & Harris, for appellant.

Spahr & Daily, for appellee.

BLAIR, J.—The complaint in this case is upon a promissory note made by the defendant Major to the other defend-

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ants, as partners doing business in the firm name of Vancamp & Jackson, payable at the office of Pettit, Braden & Co., Bankers, Indianapolis. The defendants, except Major, suffered a default. Major answered in abatement, that at the commencement of the suit and service of process he was, and is a resident of Shelby county in the State of Indiana, and that the other defendants reside in Marion county; that said Vancamp, and Jackson are the owners in equity of the note sued on, and that the assignment to the plaintiff was for the purpose of having suit brought against Major in the courts of Marion county, and having the note collected by process of law for the benefit of said Vancamp and Jackson; that the note was assigned for the purpose of using the names of Vancamp and Jackson as co-defendants with Major, to confer jurisdiction on a Court of Marion county, that a judgment might be rendered therein, and execution caused to be issued against said Major to make the debt of the property of Major for the use of Vancamp & Jackson; wherefore the defendant Major says that said Vancamp & Jackson are not liable to judgment on the note, or their assignment, and that the assignment of the note, and the action thereon, are in fraud of the jurisdiction of this Court, and of the right of the defendant to be impleaded in the County of Shelby.

A demurrer was sustained to this answer, and the defendant declining to answer further, judgment was rendered against him, judgment having previously been rendered against the other defendants.

The defendant, Major, appealed to General Term. The plaintiff filed an affidavit under Section 26 of the act organizing this court, acts 1871, page 53, requiring the appellant to file a bond; and an order was made that a bond be filed. A motion has now been made to dismiss the appeal, because no bond has been filed. The only effect of filing the affi-

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davit and making the order to file a bond, is this: that after an affidavit for a bond is filed, an appeal will not work a stay of proceedings on the judgment at Special Term until a bond is filed.

The appeal may be taken to the General Term, in such cases, as it may now be taken from a Circuit Court, to the Supreme Court, but where it is shown by affidavit to be necessary for the protection of the rights of the parties, unless a bond is filed, proceedings below will not be stayed; but an appeal cannot be dismissed because a bond is not filed.

The ruling upon the demurrer to the answer is the only question presented in the assignment of errors.

The complaint alleges facts showing ownership in the plaintiff. The answer to be good must set up other facts inconsistent with such ownership. The complaint alleges an assignment of the note to the plaintiff in writing, for value. The answer starts out by an assertion that Vancamp & Jackson are the equitable owners of the note in suit. This is an admission that the plaintiff may be the legal owner. There is no fact alleged, which in terms denies that the note was assigned for value. The mere statement that the plaintiff was to collect the note for the benefit of Vancamp & Jackson, is an inference to be drawn from a given state of facts, or from the terms of an agreement made between the plaintiff and Vancamp & Jackson.

No facts are alleged from which such an inference would arise, nor is any agreement alleged to have been made to that effect.

In the case of *Lawrence v. Long*, 18 Ind., 301, the answer alleged that the assignment was without consideration, in addition to other facts showing that the plaintiff was not the real party in interest. The answer in the case at bar does not, therefore, come within the rule in that case.

The allegation that Vancamp & Jackson are not liable

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to judgment, and execution on their assignment, is but an averment of a conclusion of law, and such conclusion does not arise from the facts alleged in the answer. *Norvell et al. v. Hittle*, 23 Ind., 346.

The answer was, therefore, bad, and the judgment must be affirmed.

IN GENERAL TERM, 1873.

JOHN B. STUMPH v. HAYDEN S. BIGHAM, Appellant.

MORTGAGOR—*equity in—party to foreclosure—*

STATUTES—*construction—*

PRACTICE—*new trial.*

A mortgagor conveying his equity of redemption is not a necessary party to the foreclosure, unless it is sought to subject other property belonging to him to the satisfaction of the debt, which the simple foreclosure will not accomplish.

The language of Sections 633-5-7-38, 2 G. & H., 294-5-6, comprehends as synonymous, the terms—"judgment-debtor, and judgment-defendant"—and imply the same person within the meaning of the redemption law; and a subsequent purchaser under the mortgagor, in possession of the premises for one year after their sale, is a judgment debtor, and is liable for the rents, and profits in case of non-redemption.

It is not error to refuse a new trial upon an affidavit, which contains matter that would not constitute a good defense upon the trial.

J. S. Harvey, for appellant.

C. L. Holstein, for appellee.

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NEWCOMB, J.—This is an appeal from a decision at Special Term, overruling a motion by the defendant to set aside a judgment rendered against him on default, and to permit him to answer the complaint.

A bill of exceptions informs us that the motion was overruled on the ground, that the affidavit filed in support of it, did not disclose a defense to the action.

The complaint, and affidavit combined, present this state of facts:

One Martha Dawson made her promissory note, and secured it by a mortgage on certain real estate, described in the complaint; which note, and mortgage became, by assignment, the property of the plaintiff, Stumph.

The mortgagor subsequently sold and conveyed the mortgaged premises to one Barnitz; the latter conveyed the same to Samuel W. Burnham, and Burnham conveyed to the defendant, who afterward took possession thereof. After these several conveyances Stumph foreclosed the mortgage, making Martha Dawson, and the defendant Bigham, parties defendant.

The mortgaged property was duly sold under the foreclosure judgment, and was purchased by the plaintiff, he receiving a certificate of sale. The property was not redeemed, and at the expiration of one year from the date of the sale, a deed was executed by the Sheriff to the purchaser, who then instituted this suit to recover from Bigham the rental value of the premises, which he had occupied from the time of the Sheriff's sale to the date of the deed.

The affidavit states that Bigham, between the time of his purchase from Burnham, and the execution of the deed by the Sheriff, made lasting improvements on the mortgaged property, of the value of \$250.

The points made against the ruling at Special Term are:

1. That Martha Dawson, and not the defendant, is liable

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to the Sheriff's grantee for rents, on failure to redeem.

2. That if liable for rents, the defendant is entitled to a set-off to the amount of his improvements.

The Statute of June 4, 1861, 2 G. & H. 271, gives a right to the owner of land sold on execution, or to any mortgagee thereof, or a judgment-creditor having a lien on the land so sold, to redeem the same at any time within one year from the date of such sale, by paying to the purchaser, or to the Clerk of the Court, from which such execution, or order, was issued, the purchase money, with interest thereon at the rate of ten per cent. per annum.

The judgment-debtor, is, by the terms of the statute, entitled to the possession of the real estate so sold, for one year after the sale; but in case he fails to redeem by the end of the year, he is made liable to the purchaser for the reasonable rents, and profits of the premises.

Martha Dawson had sold and conveyed her equity of redemption, prior to the foreclosure of the mortgage, and as to the foreclosure, she was not a necessary party. The only purpose in making her a defendant was to obtain a personal judgment on the note, so that if any balance of the debt against her remained unsatisfied after the sale of the mortgaged premises, an execution might issue therefor against her property. *Stevens v. Campbell*, 21 Ind., 471; *Story's Equity Pleading*, Sec. 197; *Buckham v. Beaver*, 17 Ind., 367; *Shaw v. Hornaday*, 8 Benf., 165.

Bigham, being the owner in fee of the mortgaged premises, was a necessary party defendant, and the only defendant really necessary to the foreclosure. His rights in the property were duly foreclosed; he submitted to a sale, failed to redeem, and used and occupied the premises for a year after the Sheriff's sale, and we see no ground on which he can, or ought to be absolved from making to the purchaser the compensation provided by the statute in such cases. The

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foreclosure was, as to his interest in the property, a judgment, so designated in the statute, and he was, within the meaning of the redemption law, a judgment-debtor, although no personal judgment was rendered against him for the debt.—2 G. & H. 294–5–6; sections 633–5–7–8. Martha Dawson cannot be liable, for she had parted with all her interest in the land before the foreclosure, and neither used, nor occupied it thereafter.

There is nothing in the claim of Bigham to be compensated for his improvements. The affidavit does not show but that they were made after the foreclosure; but if made before, we are not aware of any rule of equity that would give him compensation for them when he had no notice of the prior mortgage at the time he made them, as the judgment of foreclosure against him necessarily shows that he had.

The judgment at Special Term is affirmed, with costs.

NOTE.—Council for appellee submitted by brief:

“It is true this court has held that under Sec. 559, 2 G. & H. 273, the summons and the return of the Sheriff thereon, showing service, must appear in the record of a judgment on default. *The N. A. & S. R. R. Co., v. Welch*, 9 Ind., 479.

It has also been repeatedly held, that an objection to the record for want of such showing must be first made in the court below, and that it cannot be raised in the first instance in this court. *The C. & C. R. R. Co., v. Calvert*, 13 Ind., 489; *Harlan v. Edwards*, 13 Ind., 430; *Frasier v. Hubbell*, 13 Ind., 432; *Blair v. Davis*, 9 Ind., 236.

To the latter proposition, or rather its application, this court in *Coch-nower v. Coch-nower*, 27 Ind., 253, made an exception. In that case, which was an appeal from a judgment of divorce on default, the court held that the question of the defect of the record in not showing the summons, and return could be first made on appeal, because the appellant had no other remedy, the court below having no power to disturb a judgment of divorce after the term at which it was rendered. The general rule, however, as laid down in the several cases *supra* is recognized and approved.

No reason can be suggested for not applying the rule to the case at bar.

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Not only had the court below full power to hear and determine the objection now first made, but the appellant had his day there without making it.

Before the code it was held in several cases, that the summons and return were necessary parts of a record of a judgment by default. Reviewing these cases, Judge Sullivan, in *Dixon v. Boyer*, 7 Ind., 547-8, said :

"The decisions of this court heretofore made are to the effect, that in a judgment by default, it must appear by the record, that the defendant had notice of the suit, otherwise the judgment against him will be erroneous. 4 Blackf., 169; 5 id. 332. But we do not think it material whether the fact appear from the return of the writ, or notice set out in *hanc verba* in the record, or whether it appear from the substance of it set out in the judgment of the court. In either case, the fact is shown by the record, and that is all that is required. If the court were satisfied of the fact, and so express themselves, the presumption is, in the absence of evidence to the contrary, that the proof of the fact was legal and sufficient."

The record of a judgment upon default, rendered by a court of general jurisdiction, could not be attacked collaterally upon the ground that the summons and return were not set out. The court is held to be competent to decide upon its own jurisdiction without setting out in its records the facts and evidence upon which such decision is based. Its record, or judgment is an absolute verity, not to be impeached. It is so held even where the record is altogether silent as to the summons, and its service. Collaterally, the jurisdiction of the person of the judgment defendant would be presumed conclusively.

Freeman on Judgments, Secs. 122, 124, 132. It follows then, of course, that such a judgment is not void.

By the act approved March 4th, 1867, (Acts 1867, p. 100) amendatory of section 99 of the code, 2 G. & H. 118, it becomes the imperative duty of the court below to relieve a party from a judgment taken against him through mistake, inadvertance, surprise, or excusable neglect. It would seem to follow that as the court below not only has full power to so relieve a party, but is, by law, commanded so to do, the invocation of that power is a condition precedent to a status in this court. *Barnes v. Wright*, 39 Ind., 293 *Barnes v. Conner* 39 Ind., 294.

The weight of authority denominates the possession of the mortgagor a tenancy. The mortgagor is tenant to the mortgagee: 1 *Hilliard on Mortgages*, 184 *et seq.*

The appellant claiming under the mortgagor, of course, stands in the same relation. The redemption act does not change that relation. It could not. It simply prolongs the tenancy for one year.

A tenant cannot set off the value of improvements made by him voluntarily in an action to recover for use and occupation. *Grossman v. Lauber*, 29 Ind., 618.

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The owner is never chargeable with the repairs and improvements made by the tenant on his own motion.

Improvements made by the mortgagor or his assigns with notice of the mortgage, attach to the realty, and become a part of the security. *Winslow v. Merchants, etc.*, 4 Met. 310; *Winslow v. King*, 8 Wend. 584; *Shepherd v. Philbrick*, 2 Denio, 174; *Jones v. Thomas*, 8 Blackf. 428; *Cross v. Pendleton*, 1 Leigh. 297, 306.

IN GENERAL TERM, 1873.

JOSEPH B. DESSAR v. WILLIAM C. RICH, ET. AL., Appellants.

PRACTICE—

EXCEPTIONS—

SURETYSHIP.

INDORSER.

Where there is a plea of former adjudication, and it is shown that the issues joined were such that the question presented by the issues in the cause being tried, need not have been passed upon in arriving at the judgment rendered in the former cause, it is competent to show by a bill of exceptions, containing the evidence, and agreement of the parties filed in the former cause, that the issues now presented were not before tried.

Where a judgment is rendered against the makers, and an indorser of a note, without any finding that the indorser was surety for the makers, the indorser stands as a joint judgment-debtor only, and a payment of the judgment by such indorser, extinguishes the judgment, in so far, at least, that he cannot afterwards have an execution issued for his benefit against the other parties to the judgment.

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In such case, the judgment plaintiff, after payment by the indorser, has no interest in the judgment that can be sold, or assigned to any one else, or collected without assignment, for the benefit of any other person. Nor had such indorser any interest in the judgment that he could sell, or assign.

Morrow & Trusler, for appellants.

Dye & Harris, for appellee.

BLAIR, J.—The complaint in this case alleges, that on the 10th day of November, 1871, the Merchants' National Bank of Indianapolis, recovered a judgment in the Superior Court against Daniel C. Rich, Abijah Rich, Harvey Rich, Reuben D. Rich, and the plaintiff, Joseph B. Dessar, on a note made by the Rich's, payable to the plaintiff in this cause, and by him indorsed; that afterwards the plaintiff paid, or deposited with the Merchants' National Bank, the amount of principal, and interest of the judgment, with the agreement between the plaintiff, and the bank, that the plaintiff should be the equitable owner of the judgment, and that the bank should collect the same of the makers of the note for the benefit of Dessar, the plaintiff; that afterwards, on the 28th of June, 1872, the bank, without the consent, or knowledge of Dessar, the plaintiff, assigned the judgment to one William C. Rich, who has caused execution to issue on the same, and the Sheriff is about to levy on the property of the plaintiff; wherefore, the plaintiff asks that the defendant William C. Rich, and the Sheriff may be enjoined from levying the execution, and that the judgment may be declared satisfied, and the execution quashed.

A second paragraph of the complaint is substantially the same, except that it avers that Dessar, the plaintiff herein, paid the judgment, and was discharged before the assignment of the judgment to William C. Rich.

The first error assigned is the overruling of separate demurrers to each paragraph of the complaint.

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The first paragraph of the complaint has a degree of uncertainty in it, because it alleges that the amount of the judgment was "paid, or deposited with the bank," but in either event, the allegations are sufficient to show that the bank could no longer collect the judgment of the plaintiff, and the assignee could not acquire any greater rights by the assignment; hence, we believe the complaint good.

There was a plea of former adjudication filed by the defendants, to which the plaintiff replied, that the record of the former suit showed an agreement made in open court, that the question of equitable ownership of the judgment by the plaintiff, on account of the payment to the bank was not raised, and hence was not passed upon.

After the defendants had introduced in evidence all of the record in the former suit, except a bill of exceptions filed in said cause, the plaintiff then offered in evidence, a bill of exceptions filed in said cause, containing the evidence, and also showing an agreement in open court, substantially as set up in the reply of the plaintiff. To the introduction of this evidence the defendants objected, and it was admitted over the objection.

This is assigned as error. We think the evidence was rightly received. The issues joined in the former cause were such that the precise question presented by the issues in this proceeding, need not have been passed upon in arriving at the judgment before rendered. In such case it is competent to show by the evidence, that the issues now presented were not tried in the former cause. *Day et al. v. Vallette*, 25 Ind., 42; *The Washington, Alexandria & Georgetown Steam Packet Company v. Sickles et al.*, 24 How., 333.

The bill of exceptions was, therefore, admissible for this purpose. All the other errors assigned are comprehended within the one, that the finding is not supported by the evidence.

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The evidence sustains the main facts alleged in the complaint. The judgment that was recovered by the Bank against Rich's, and the plaintiff Dessar, was in the ordinary form, without any finding that Dessar was a surety for the Rich's. Without such finding, he stood but as a joint judgment debtor, and a payment of the judgment by him extinguished the judgment; in so far, at least, that no execution could afterwards be issued against the other parties to the judgment for his benefit. *Loyal et al., v. Rowley*, 17 Ind., 36. The fact that if the judgment was collected from the makers of the note, the plaintiff was to have the benefit of the amount so collected, made the payment by Dessar none the less a payment of the judgment. Without an adjudication of the question of suretyship by the court, the plaintiff, and one of the judgment defendants, had no right to assume that an execution could be issued, and levied of a portion of the judgment defendants for the benefit of a co-defendant.

The Bank was entitled to but one satisfaction of the judgment, and having had that from a party that was liable, she had no interest in it to be sold, or assigned to any one else, or collected without assignment for the benefit of any other person. See the case of *Loyal et al. v. Rowley*, before cited, and the statute therein commented upon, and construed. Nor had Dessar any interest in the judgment that he could sell, or assign. He had a right to have had the question of suretyship tried, and after that, if he paid the judgment, it would still be kept alive for his benefit, but without this, he had only his right of action against his co-defendant in judgment.

We see no error, therefore, in the cause, and are of the opinion that the finding, and judgment of the Court is fully sustained by the evidence.

Judgment affirmed.

Rogers v. Voss et al.

IN GENERAL TERM, 1873.

DUDLEY ROGERS, Appellant, v. GUSTAVUS H. VOSS, ET AL.

PRINCIPAL, AND SURETY—*execution against.*

EXECUTION—*how and when may be levied.*

A joint execution directed against a principal and surety, is to be levied upon the property of both, but it must be satisfied in the order of their relation to the suit. If, after exhausting the property of the principal, the execution is unsatisfied, the Sheriff may then, in the life time of the execution, subject the property of the surety to the judgment.

Property that has passed into the custody of the court in bankruptcy, cannot be levied on by the Sheriff, unless his execution shows a prior lien on the property.

Hanna & Knefler, for appellant.

PERKINS, J.—Judgment was obtained by Mr. Voss, in the Marion Superior Court, against one Kelly, as principal, and Dudley Rogers, as surety. Execution was issued to Putnam county, where Kelly, the principal, resides, and where, if anywhere, he had property. Kelly filed a schedule, as allowed by statute, showing no property subject to execution. It would seem that the Sheriff had made sale of such property of defendant as he could find, before the filing of the schedule. The Sheriff then levied the execution on the property of Rogers, the surety, in Putnam county, and advertised it for sale. Rogers applied to the Superior Court for an injunction restraining the sale of his property. Injunc-

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tion denied. It appears that Kelly has been adjudged a bankrupt, and that no distribution had been made of the moneys realized from the assets of his estate, if any had been; and it is contended by Rogers that the estate of Kelly, the principal in the judgment, has not been so exhausted as to overthrow a levy on the property of the surety, (the plaintiff Rogers), and will not be till such distribution of the assets in bankruptcy takes place. Dates are not given as particularly as they should have been, to enable the Court to get a clear view of the whole case, but on the point relied on in argument, it not being shown that the judgment or execution had priority by lien, we have not a doubt. The section of the Statute under which the application for injunction is made, reads thus: 2 G. & H. p. 309, Sec. 675.

“If the finding upon such issue be in favor of the surety, the Court shall make an order directing the Sheriff to levy the execution, first upon, and exhaust the property of the principal, before a levy shall be made upon the property of the surety; and the Clerk shall indorse a memorandum of the order on the execution.”

It appears from this section that a joint execution issues against the principal, and surety—that said execution is to be levied by the Sheriff upon the property of both the principal, and surety; but in this order, viz: he is first to levy on the property of the principal subject to execution, in his bailiwick, and sell it. When he has done this he has exhausted the property of the principal. He may then, in the life time of the execution, levy it on the property subject to execution of the surety, and sell it to satisfy the execution. The exhaustion of the property of the principal is to be by the Sheriff, on the execution, and of course, relates only to property subject to the execution in the hands of the Sheriff. After the defendant's property passed into the custody of the Court in Bankruptcy, the Sheriff could not levy on it, unless

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his execution was a prior lien on the property, a fact which is not shown in this case.

The judgment is affirmed.

IN GENERAL TERM, 1873.

ELIAS M. RONEY v. LEVI WOOD, ET AL.

HOUSEHOLDER.

A married man is not absolved from the legal, or moral obligation of providing for his family, by his declared intention of not again living with them. Though he may be living separate, and apart from them, he is still amenable to the law for their support, and is, therefore, a resident householder, within the meaning of the act of exemption, and as such is entitled to claim the privilege of exemption of his property from sale on execution.

Morrow & Trusler, for plaintiff.

Smith & Hawkins, for defendants.

BLAIR, J.—The only question presented by the record in this cause, is whether the plaintiff is a resident householder, within the meaning of the act to exempt property from sale on execution. 2 G. & H. p. 365.

By an agreed state of facts, it is admitted that the plain-

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tiff is a married man; that his wife, and children reside together in the city of Indianapolis as a family, and have in their possession certain household goods; that the plaintiff does not reside with his family, that he lives in said city, but separate, and apart from his family, and so lived prior to the levy of the execution mentioned in the complaint; and that he has not, during such time, supplied his family with the necessities of life, and has declared his intention of never again residing with his family; that he has in his possession two mules which are sought to be exempted from sale on said execution, and which, together with the household property in possession of the family, are included in the schedule mentioned in the complaint; and that the said plaintiff has paid the rent on the house formerly occupied by his family up to the first day of March, 1873, (that being the month within which this proceeding was instituted).

The statute exempting property from sale on execution in certain cases, was passed in obedience to the requirements of a provision in the Constitution, and according to all the authorities, should be liberally construed. It is rather a provision for the benefit of the family; for those who are dependent upon the head of the family for support, than for the benefit of the debtor himself.

In the absence of the husband from the State, or from his home, the wife may claim, and assert the privilege of exemption. (*See statute supra*).

That the plaintiff in this case has not supplied his family with necessities, and has declared his intention of not again living with them, does not absolve him from either the legal, or moral obligation resting upon him to support them; nor does it cut them off from the benefit that may be derived from the exemption. That he paid the rent of the house occupied by his family up to a very recent period, is contributing to their support.

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It is further provided by statute, that a wife, in case of abandonment by the husband, and a failure on his part to provide for the support of the wife, and family, may, by proper proceeding, have property sold and applied to her support, and that of her children. *Acts of 1857, page 94, 1 G. & H., page 377.*

We are, therefore, of opinion, that in contemplation of law, the plaintiff is still the head of the family, and that he is entitled to claim the privilege of exemption accorded by the statute to a resident householder.

The judgment at Special Term is affirmed.

IN GENERAL TERM, 1873.

THE TERRE HAUTE &C., RAILROAD COMPANY v. THE BOARD
OF COMMISSIONERS OF MARION COUNTY, Appellant.

RAILROADS—*assessment of, for taxes—*

TAXES—*assessment, when valid.*

In a suit to enjoin the collection of taxes under Act of 1865, entitled, "An Act to secure a just valuation, and taxation of all railroad property within the State," &c.

Held: That under this act there are but two instances in which separate pieces of railroad property can be listed, and taxed upon their value as pieces of property; one is where the property held by the railroad

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company is needed and used for railroad purposes: the other is where the assessment is made by a town or city, of railroad buildings, fixtures, and machinery connected therewith, within its limits.

In all other cases the individual pieces of property cannot be assessed, but their value is considered within the other facts enumerated in Section 2 of the act, in estimating the value of the road upon which the assessment is to be made, and are to be deemed "to be embodied in the taxes by the mile of the road."

Taxes, to be valid, must be assessed pursuant to the law authorizing them; the court cannot legalize an illegal assessment, nor make a new one.

Barbour & Jacobs, for appellant.

Hendricks, Hord & Hendricks, for appellee.

PERKINS, J.—Suit by the Railroad Companies named below, against the Commissioners, and Treasurer of Marion county, instituted pursuant to the following agreement, to enjoin the collection of the taxes therein mentioned.

WHEREAS, There appears among other advertisements for delinquent taxes, the following:

Union Railway Company, No. 14,140, depot, tracks, etc., north part square 96, value \$60,000; value of improvements, \$65,000; value of lot and improvements, \$125,000; total value of taxables, \$125,000; amount of delinquent tax, penalty, and interest, \$1,537; amount of tax for the current year, \$1,775; cost of advertising, 60 cents; total amount of taxes due, \$3,312.60. And, whereas, it is proposed, by the proper county officers of Marion county, Indiana, on this day to sell said described property to pay said total sum; and, whereas, the owners of said property, to wit: The Jeffersonville, Madison & Indianapolis Railroad Company; The Terre Haute & Indianapolis Railroad Company; The Indianapolis, Cincinnati & Lafayette Railroad Company; The Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, and the Columbus, Chicago & Indiana Central Railway Company, denying that said property, or any of it is liable

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to said tax, or any part thereof, and propose to the Board of Commissioners of Marion county, that said sale shall not be made, and that the question of validity of said tax shall be determined by such legal proceeding as shall be determined upon, hereafter by council of proper parties, and said Commissioners have agreed to said proposition.

In consideration of all of which it is agreed, by said county on the one part, and by said railroad companies by Dillard Ricketts, and Edward King, on the other part, that said suit shall be instituted in one of the Courts of Marion county, to determine whether said taxes, or any part of them is valid, and either party may appeal therefrom to the Supreme Court, and whatever amount of said tax is adjudged a valid tax upon said property, or any part thereof, said companies agree to pay.

It is further agreed that the Court, in determining the question of the validity of the tax, or the liability of any company to pay, shall not be restricted merely to the liability of the Union Railway Company, or any, or all of the companies above named; but it is agreed that, if any railroad company shall be liable for said tax, or any part thereof, that the said railroad company adjudged liable therefor, shall pay the same.

Whenever suit is commenced, the proper defendants shall enter an appearance, and submit to a rule to plead within ten days.

It is further agreed that the companies named, or some of them, shall within three months, execute, or procure to be executed, such bond to the satisfaction of said Board of Commissioners, or Barbour, Jacobs & Smith, or either of them, as will secure a compliance with this contract.

(Signed,)

EDWARD KING,
D. RICKETTS.

Dated, this 6th day of February, 1871.

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The Court, in Special Term, perpetually enjoined the collection of the taxes specified above. The following facts are all that are material in the decision of the cause. The property on which the taxes, sought to be enjoined, were assessed, is railroad property, used for railroad purposes, and the taxes were assessed upon the lands and improvements in the same manner as the property of natural persons is assessed. The assessment was made, it is presumed, by the County Treasurer, the property not having been reported by the railroad companies, or either of them, to the County Assessor, nor considered by him, in valuing the railroads.

Was the assessment legally made? is the question. It will not be necessary for us, in the view we take of the case, to inquire whether the taxes were assessed by an officer having power to make an assessment in any contingency, or upon the proper railroad company, as we have come to the conclusion that the tax was not assessed in a legal manner, not upon a legal basis, by any officer, upon any company. The assessment of the taxes in question was controlled by the act of 1865, (3 Statute by Davis, p. 418), and to be legal, must be conformable to that act.

The act is entitled, "AN ACT to secure a just valuation and taxation of all railroad property within this State," &c.

The following sections of the act prescribe the basis, and manner of taxing railroad property:

"SECTION 1. That all railroad companies, having the whole, or any portion of their lines of railroad within this State, shall, on or before the first Monday in April, eighteen hundred and sixty-nine, and on the first Monday in April thereafter, in such years in which there shall be a general appraisement of the real property of the State, furnish to the appraiser of each county through which their respective roads may run, a written statement of the length of the line of such roads within his county, and also a statement of all the

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machine shops, depots, depot grounds, rolling machinery, and other property of such company, used by it in doing the business thereof, within this State, and of the gross earnings; and also the average net earnings of said road, over and above the current necessary expenses in transacting its business, and for repairs during the five years immediately preceding such statement, which shall be verified by the oath, or affirmation of the proper officer of such company making such statement.

Sec. 2. The appraisers of the counties through which such roads may run, if through more than one county, shall, within thirty days after such Monday in April, meet at such time and place on the line of such roads as shall be designated by the Auditor of State, or if he fails to designate, and notify said appraisers of such time and place of meeting, within twenty days after such first Monday in April, then, at such time, and place as a majority of such appraisers shall designate; and said appraisers, or a majority of them, shall ascertain and appraise the value of said road per mile, by first making a valuation of the said railroad, and all its fixed property, situate within this State, including all its depots, depot grounds, machine shops, and other buildings erected thereon, and such proportion of the rolling stock, and movable property used in operating the whole road, if part thereof is without this State, as the length of the railway in this State bears to the entire length thereof, within and without this State; and in estimating the entire value of said railroad, and its equipments, the appraisers shall take into consideration its location for business, the competition of other transportation routes by rail, or by water, its earnings, expenses and repairs, the then present condition of its roadway, and equipments, and its value as an investment, without reference to its cost, or indebtedness; *provided*, that all lands owned, or held in trust, by any railroad company, and not

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actually needed, or used in operating the road, shall be assessed for taxation, and the taxes collected, in the counties where they may be situated, in the same manner as taxes are assessed and collected on the lands of natural persons, and the County Auditor shall apportion such valuation of such railroad for county and township purposes, according to the length of such road through such county, or township.

SEC. 3. The appraisers, after making the valuation as aforesaid, shall then apportion, by the mile, the whole value of the railroad and its equipments, thus ascertained, and estimated, to the counties, respectively, in proportion to the length of road in each county through which it runs, and such value by the mile, shall be the basis for the assessment of all taxes levied by State, county, and township authority, through which such road passes, according to the rate of taxation for other property.

SEC. 4. Authorizes the appraiser to make the statement required in the first section, if not furnished by an officer of the company.

SECS. 5 and 6 are not material to the decision of this cause.

SEC. 7. The cities, and incorporated towns, through, or into which a railroad may pass, may assess any railroad building, fixtures, and machinery connected therewith, within the city, or town limits, on the same basis, and in the same manner that the like property of natural persons is assessed; and collect the taxes thereon as other taxes are collected; but the rolling machinery used in operating the road shall be deemed to be embodied in the taxes by the mile."

An analysis of this statute shows that there are but two instances in which separate pieces of railroad property can be listed, and taxed upon their value as pieces of property. One, is where the property held by the railroad company is not needed, and used for railroad purposes. The other, is

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where the assessment is made by a town, or city of any railroad building, fixtures, and machinery connected therewith, within its limits.

In all other cases, the individual pieces of property cannot be assessed, but their value is considered, with the other facts enumerated in section two of the act, in estimating the value of the road upon which the assessment is to be made, and are to be deemed, in the language of the statute "to be embodied in the taxes by the mile" of the road.

The taxes in this case, then, no matter by whom assessed, or upon what road, were illegally assessed, and the assessment is void; and the Court cannot legalize that assessment, nor make a new one, because it has not before it, and cannot probably obtain the data required by section two of the act, as the basis on which the assessment is required by the statute to be made, even if it would, in that event, have the power to make it. Taxes, to be valid, must be assessed pursuant to the law authorizing them.

The judgment at Special Term must be affirmed.

Bush v. Fetrow *et al.*

IN GENERAL TERM, 1873.

CONRAD BUSH, Appellant, v. CHARLES FETROW, ET AL.

APPEAL BOND—*suit on*—

DAMAGES—*for rents, &c.*

Plaintiff alleges that defendant remained in possession of property pending an appeal for a judgment for possession, and by reason thereof plaintiff lost his rents, and profits.

Held: That damages for rents accruing after the judgment appealed from was rendered, and before possession was obtained by the plaintiff, cannot be recovered in an action on the appeal bond. The conditions of the bond, under the code, do not embrace rents and profits to be accounted as damages, for detention of property during an appeal to a court of error.

Finch & Finch, for appellant.

Klingensmith, for appellee.

BLAIR, J.—This is a suit upon an appeal bond. The plaintiff avers that he obtained a judgment at Special Term on the 18th of May, 1872, against the defendant, Porter, for the sum of \$90, and for possession of certain real estate, from which judgment the said defendant appealed to General Term, and filed the bond in suit with Charles Fetrow, as his surety. The bond is conditioned that "if the said Porter shall prosecute his appeal to effect, and without delay, and pay such judgment as shall be rendered against him on said appeal, then this bond to be void, else in force."

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The plaintiff avers that the judgment was affirmed on appeal. The breach of the bond alleged in the first paragraph of the complaint is, that the defendant, Porter, remained in possession of the real estate pending the appeal, and continued in possession until November, 1872, by reason of which the plaintiff avers that he lost the value of the rents of the property.

A second paragraph of the complaint is substantially the same, the plaintiff averring that the defendant, Porter, remained in possession of the real estate, receiving the rents and profits thereof, until November, 1872.

A demurrer of the defendant, Fetrow, was sustained to each paragraph of the complaint, and the plaintiff declining to plead further, judgment was rendered for the defendant.

The plaintiff appeals from this judgment.

The only question presented is this: Can the plaintiff, in an action on the appeal bond, recover of the surety damages for rents accruing after the judgment appealed from was rendered, and before possession was obtained by the plaintiff?

In the case of Doe v. Daniels and others, decided by the Supreme Court in 1841, (6 Blackf. 8) it was held, in a suit upon a bond given on an appeal to the Supreme Court, from a judgment rendered in an action of ejectment by a Circuit Court, that the plaintiff could not recover *mesne profits*; in other words, that the condition of the bond did not embrace damages not included in the judgment of the Circuit Court. The provisions of the statute then in force, in reference to bonds on appeal from Circuit Courts to the Supreme Court, were in legal effect the same as the general provisions now embraced in sections 555 and 563, of the code, (2 G. & H., pages 271 and 274).

In the Revised Statutes of 1843, in addition to the general provisions in regard to appeal bonds, which are in the exact words of our present statutes, (see sections above cited),

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there was an additional section, providing that when any appeal is taken from a judgment "for the recovery of land or the possession thereof, the condition of the appeal bond, in addition to the matters herein before prescribed, shall further provide, that the appellant shall also pay, and satisfy all damages which may be sustained by the appellee for the *mesne profits* of the premises recovered, or for any waste committed thereon, as well before as during the pending of such appeal." R. S.. 1843, page 633.

Under this statute the case of *Malone v. McClain and another*, 3 Ind., 532, was decided, and it was there held that the plaintiff could not recover on the bond for rents, and profits, because the condition of the bond in suit was only such as were required by the general provisions covering appeal bonds, and did not conform to the conditions required by the statute in cases of appeals from judgment for the possession of real estate.

We have no provision in our present code corresponding with the statute of 1843, above cited.

In the act concerning the unlawful detention of lands, and the recovery thereof, (2 G. & H. 630) it is provided that an appeal may be taken from a judgment of a Justice of the Peace, or Circuit Court, on filing bond securing damages, and costs, &c.

On such appeals the cause is tried *de novo*, and section 11 of the act provides that, "On the trial of any cause under this act, either before the Justice of the Peace, or on appeal, the damages for the detention of the premises shall be estimated up to the time of each trial, while damages on appeal by the defendant shall be deemed as covered by the appeal bond."

We do not think the provisions of this section make the conditions of an appeal bond in such cases, cover damages beyond the trial of the cause upon its merits, at which time

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a judgment may be rendered for all damages sustained up to the time of the last trial. Where an appeal is taken to a court for the correction of errors, the provisions of this section do not apply.

In the case of *Jones and another v. Droneberger*, 23 Ind., 74, it is said that though an appeal bond did not expressly purport to cover rents, it operates to cover all damages in the case by virtue of the statute of the State. No statute is cited in support of the ruling; but the case of *Ward and another v. Buell*, 18 Ind., 104, is referred to as sustaining the views of the Court. In that case the appeal bond was given on an appeal to the Supreme Court, from an ordinary judgment of a Circuit Court, and the question in the case at bar is not discussed or alluded to. Section 790 of the code, 2 G. & H. 333, is cited, and construed in that case, but we fail to see that the construction of that section aids us in the present case. It provides that no bond shall be "void for want of form of substance, or recital, or condition, nor the principal or surety be discharged;" but they shall be "bound, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond, or recognizance."

This section will not allow us to extend the obligations of a bond, beyond the terms of the statute requiring it to be given, however defective the bond may be in form, or substance. It is the absence of any statute expressly extending the obligations of the bond in suit, so as to cover rents and profits, during an appeal to a court of error, that prevents us from sustaining the complaint in the case at bar. It is doubtless an omission; but if we should hold that the statute of 1843, is in force, it would not aid the plaintiff, for under that statute it was decided that the conditions must be set out in the bond. Statute 1843, *supra*; also, *Malone v. McClain*, *supra*. Under our present code, after verdict, we

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might hold that under the provisions of section 790, (*supra*) the defect in the bond might be deemed cured, but as the question is here presented on demurrer, we do not decide it. We have no doubt, but that this court has the power to prescribe that bonds, in such cases, shall be given with conditions covering accruing rents, and profits, but as the bond in suit does not contain any provisions extending that far, and there being no statute having that effect, it follows that the ruling of the Court at Special Term was right.

Judgment affirmed.

NOTE.—See *Sedgwick on Damages*, pp. 452, 453, and notes. See, also, p. 86, and notes.

IN GENERAL TERM, 1873.

TEMPLE C. HARRISON v. LAVIN M. RUSSELL, HIRAM MINICK,
AND JAMES TAYLOR, Appellants.

EVIDENCE—*of character, when in issue.*

The appellee had judgment against the defendants at Special Term. The suit was for money which the appellee claimed the defendants had unlawfully taken from his person, under such circumstances as to make them guilty of the crime of robbery, or larceny. The defendants

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below offered evidence of good character for honesty, and integrity at the time of the act complained of, and at the time of the trial. The evidence was excluded, and the defendants appealed.

Held: That in civil causes such evidence was inadmissible; that although the acts complained of may be such as to constitute a criminal offense, the character of the parties is not in question, unless it is in issue; and it is only where character is a matter in issue that it ceases to be of a circumstantial nature—in such cases there is no objection to receiving it.

Every man must be answerable for his every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties.

Ritter & Ritter, for appellee.

Hanna & Knefler, Leathers, Duncan, for appellants.

BLAIR, J.—The complaint in this case charges that the defendants wrongfully took from the person of the plaintiff, and without his consent, converted to their own use, United States currency, and bank bills of the value of eight hundred dollars, wherefore, &c.

The cause was dismissed as to Taylor.

The defendants Russell, and Minnick answered in general denial of the matters alleged in the complaint.

The cause was tried by a jury at Special Term, and a verdict rendered for the plaintiff.

A motion for a new trial was overruled, and exceptions entered by the defendants. Judgment was then rendered upon the verdict, and the defendants appealed to General Term.

The evidence introduced by the plaintiff, tended to show that the money was taken from the person of the plaintiff, under such circumstances, that the act constituted either the crime of robbery, or larceny, on the part of the defendants.

On the trial of the cause, the defendants, Russel and Minnick, offered competent witnesses to prove that at the time of the commission of the alleged wrongful act, and at the time

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of the trial, they had a good general character, and reputation for honesty, and integrity in the community where they lived. On the objection of the plaintiff, this evidence was excluded by the Court, to which ruling defendants excepted.

The exclusion of this evidence is the only point presented for review.

The first case to which our attention is directed by the appellants, in support of their position, is that of *Byrket v Monohon*, 7 Blackf. 83. This was an action of slander. M. charged in his complaint that B, had slandered him by saying that he had committed perjury. B, replied that the charge was true. The language of the Court in that case, is as follows: "The defendant undertook to prove that the plaintiff had committed perjury; and the jury in making up their minds on the subject, had surely a right to take into consideration, if the defense was not clearly proved, the general good character of the plaintiff for truth. Indeed, it would seem that such evidence ought never to be withdrawn from the jury, though it will often be rendered of no avail by the nature of the defendant's evidence. If the plaintiff were indicted for the offense, it would be proper for the jury, in making up their verdict, to take into consideration his general good character for truth; *Roscoe's Criminal Evidence*, 72; and the law must be the same in the case before us."

In that case, the question of character was directly involved. Monohon said his character had been injured, because Byrket had said he was guilty of perjury. Byrket's reply was, in substance, that his character had not been injured, for that what he had said, was true. The text cited from *Roscoe's Criminal Evidence*, is as follows: "In trials for high treason, for felony, and for misdemeanors, (where the direct object of the prosecution is to punish the offense), the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be

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entitled to great weight. (1 *Phill. Ev.*, 165, (1). This rule does not extend to actions or informations for penalties, as to an information for keeping false weights. *Attorney General v. Bowman*, 2 *Bos., & Pul.*, 532, (n). To admit such evidence in that case, would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but where the prosecution is not directly for the crime, but for the penalty, it is not."

An action to recover a penalty is a *quasi* criminal proceeding, and it would seem from the above, that if evidence of character is inadmissible in such case, much less should it be allowed in a merely civil proceeding.

The next case cited by the defendant, is that of *Shannon and wife v. Spencer*, 1 *Blackf.*, 526. This was an action against Shannon, and wife for a malicious prosecution, setting forth that they had instituted a prosecution against the plaintiff for larceny. It lay upon the plaintiff in that case to show a want of probable cause for the prosecution instituted by the defendants; and in doing so, it was held that the plaintiff might show what evidence was given on the trial for the alleged offense, and it was held that this would include the evidence given of good character; and although the Court in that case says: that, "it seems, under the same rule, that he (the plaintiff) might introduce such testimony, when he had not found it necessary to make use of it on the trial," a doubt is expressed as to the correctness of such ruling, and the court concludes with the following language: "But the doubt that hangs over the question, may, for the present, be permitted to remain, as it does not appear absolutely necessary to remove it in this case."

We are next cited to 1 *Greenleaf on Evidence*, p. 66, where the learned author, in speaking of evidence of character, after defining certain cases in which it is admissible, says: "And generally, in actions of tort, wherever the defendant is charged

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with fraud from mere circumstances, evidence of his general good character is admissible to repel it."

In support of this, the author cites the case of *Ruan v. Perry*, 3 *Caines*, 120.

This case is cited and pretty severely criticized in *Fowler v. The Aetna Fire Insurance Company*, 6 *Cowen*, 675; and although not expressly overruled, it was held to be an exceptional case, "where a naval officer was charged with gross fraud, and collusion with a foreign officer, upon slight circumstances." The Court, in speaking of the rule in the case of *Ruan v. Perry*, says: "If such evidence is proper, then a person may screen himself from punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties."

In the case of *Gough v. St. John*, 16 *Wend.*, 646, the Court, by Cowen, J., after speaking of certain civil causes, as in actions of slander, criminal conversation, and breach of marriage promise, which present frequent exceptions to the general rule, that evidence of character is not admissible in civil causes, uses the following language: "But where a civil action is brought for an injury to property, though the injury was legally criminal, and involved moral turpitude, in so much that on an indictment, character would be obviously receivable, there is no authoritative case, save *Ruan v. Perry*, which favors its admissibility." The case of *Ruan v. Perry*, is further spoken of as "virtually exploded by the later authorities."

In further support of the text cited from Greenleaf, the case of *Walker v. Stephenson*, 2 *Esp.*, 284, is cited. But this case seems never to have been followed in Westminster Hall as an authority, and the English courts adhere to

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the rule that evidence of general character is not admissible in civil proceedings, unless the character of the party be directly in issue.

In the case of *Houghtaling v. Kelderhouse*, 2 Barb., 149, the Court says the case of *Ruan v. Perry* has been distinctly and repeatedly overruled by the Supreme Court of this State, and the English rule adopted as laid down in *The Attorney General v. Bowman*, 2 Bos., and Pull., 532, note a.

In the case of *Pratt v. Andrews*, 4 N. Y., 493, Bronson, Chief J., in delivering the opinion of the Court, says: "A party to a civil suit was at one time, or rather on one occasion, allowed to give evidence of his good character in answer to circumstantial evidence on the other side, imputing to him a gross fraud. (*Ruan v. Perry*, 3 Caines, 120). But that case was long since overruled."

In the case of *Church v. Drummond*, 7 Ind., 17, the Court announces the rule to be, "that only in cases where the character is in issue, can evidence of general reputation be given." And in speaking of the text cited from Greenleaf, it is said that, "the cases he cites can scarcely be said to sustain his position."

Putting *character in issue*, when used in reference to civil causes, is a technical expression, and is confined to certain actions from the nature of which the character of the parties, or some of them, is of particular importance. Such instances occur in suits for seduction, criminal conversation, and in certain issues made by the pleadings in actions for slander, and it may also be in actions for malicious prosecution. In many of these cases, character becomes an important element to be considered in the question of damages. *Anderson, Ex. v. Long*, 10 Serg., & R. 55.

In the case of *Morris v. Hazelwood*, 1 Bush., (Ky.) 208, the action was for money, of which the plaintiff claimed to have been robbed, as in the case at bar, and evidence of the

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general character of the defendant, was held inadmissible.

We have been unable to find any authorities which we deem entitled to weight, that hold otherwise.

In the case of *Humphreys v. Humphreys*, 7 Conn., 116, the Court says: "causes charging cruelty, gross fraud, and even forgery, are often agitated in suits by individuals; and the result not unfrequently affects the property, and reputation of the party deeply; yet no individual has been permitted to attempt to repel the proof by showing a good reputation."

We believe the general rule to be that in civil suits, even where the right of action is based upon acts that constitute a criminal offense, evidence of the general character of the defendant is inadmissible, except for purposes of impeachment, where the party testifies in the cause. It is only where character is a matter in issue, that it ceases to be of a circumstantial nature, and in such cases there is no objection to receiving it. And the discussion of the question in the case of *Anderson, Ex., v. Long, supra*, affords a good illustration of the application of the rule to those cases where character may be said to be in issue.

The foregoing rules are also fully supported by the following authorities: 1 *Phil., on Ev.*, 467; also, *Cowen v. Hills*, notes to same, note 315, p. 620; *Nash v. Gilkeson*, 5 Serg., & R., 352; *Potter v. Webb*, 6 Greenl., 14; *Ward v. Herndon*, 5 Porter, 382; *Kentland v. Bissett*, 1 Wash., C. C., 144; *Smets v. Plunket*, 1 Strobhart, 372; *Gatzmiller v. Lockwood*, 23 Missouri, 168; *Wright v. McKee*, 37 Vermont, 161.

We are of opinion that there was no error in excluding the evidence offered by the defendants, and the judgment must be affirmed.

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IN GENERAL TERM, 1873.

JOHN JACKSON v. DAVID O. ADAMS AND ALBERT J. ALLISON,
Appellants.

NOTICE—*to tenant—for possession—*
PLEADING—*when defective—*
STATUTE—*construction—*
SUPERIOR COURT—*jurisdiction.*

Complaint against a tenant holding over.

Held: That a complaint against a tenant holding over must show that the relation of landlord and tenant existed; that the tenancy has been determined; that the plaintiff has a present right of possession, and it must describe the premises with reasonable certainty.

The county is sufficiently identified by locating the property in the city of Indianapolis, and State of Indiana. The State being given, the Court will judicially take notice that the city of Indianapolis is in Marion county.

If a complaint is good under the act of May 18, 1852, concerning the unlawful detention of lands and the recovery thereof, it is unimportant whether it is sufficient under Sec. 595 of the Code.

The Superior Court has original jurisdiction in suits against tenants holding over.

J. N. Scott, for appellants.

Barbour, Jacobs & Williams, for appellee.

NEWCOMB, J.—The plaintiff sued to recover possession of real estate. There were two paragraphs of the complaint to the first of which a demurrer was sustained.

The second paragraph is as follows :

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" And for second cause of action the plaintiff says the defendants were in possession of said premises as his tenants by the year, and that their yearly lease expired on the 31st of January, 1873; that on the 31st of October, 1872, he gave the defendants notice to yield possession of their premises at the expiration of the year aforesaid, a copy of which notice is in the words and figures following, to wit:

INDIANAPOLIS, IND., October 31, 1872.

To Mr. David O. Adams and A. J. Allison :

You are hereby notified to deliver up to me, at the expiration of three months from the time of receiving this notice, the possession of the following premises, viz : the third story rooms of building known as No. 39, East Washington street, Indianapolis, Indiana, now held by you of me (the said rooms being used as a photograph gallery).

Dated, this thirty-first day of October, 1872.

(Signed),

JOHN JACKSON."

But the plaintiff says the defendants refused to vacate or surrender said premises to him at the time mentioned, and now hold over and keep possession of the same without right, and keep plaintiff out of possession thereof, to his damage in the sum of five hundred dollars, for which he asks judgment, and all other proper relief.

A demurrer to this paragraph was overruled, and the defendants excepted. Issues of fact were then formed, and there was a finding for the plaintiff. The defendant then interposed a motion in arrest of judgment. This motion was overruled, to which defendants excepted, and judgment for possession of the premises was rendered in plaintiff's favor.

The objections urged against the sufficiency of the complaint are :

1. That it does not aver that plaintiff is entitled to the possession of the premises.



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2. That the premises sought to be recovered are not described with sufficient certainty :

3. That the complaint does not state what interest the plaintiff claims in the property.

The Statute in relation to the recovery of real property, 2 G. & H. 282, Sec. 595, has this provision :

“The plaintiff, in his complaint, shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession.”

The complaint is informal in its structure, but if the property in dispute is described with sufficient certainty, we think there is enough stated to show a right of possession in the plaintiff.

But under the section of the Statute, cited above, the complaint is defective for not stating the interest the plaintiff claims in the premises.

If, however, the complaint can be sustained under the Act of May 13, 1852, concerning the unlawful detention of lands and the recovery thereof, 2 G. & H. 630, it is unimportant whether it is sufficient under Section 595 of the Code of Practice.

The first section of the Act of 1852, is as follows :

“That whenever, in pursuance of legal notice, or otherwise, any landlord, or his legal representative, shall be entitled to possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over, removed from such lands, on complaint before a Justice of the Peace of the county in which such lands lie, specifying the matters relied on to justify such removal, and the damages claimed for detention, describing the premises with reasonable certainty.”

By an Act approved March 4, 1853, Courts of Common Pleas were given concurrent jurisdiction with Justices of the

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Peace, in actions of forcible entry and detainer, and against tenants holding over. 2 G. & H. 630—note.

Section 10 of the Statute creating the Superior Court, confers upon it "original concurrent jurisdiction with the Circuit Court, and Court of Common Pleas, in all civil causes except slander, and except such causes of which the Court of Common Pleas now has original, exclusive jurisdiction. Acts of 1871, p. 50.

This Court, therefore, has original jurisdiction in suits against tenants holding over.

Is the complaint sufficient under this Statute? One of its requirements is, that the premises shall be described with reasonable certainty.

In *Leary v. Langsdale*, 35 Ind., 74, the complaint, which was filed before a Justice of the Peace, described the premises as "Room No. 2, in Langsdale's block, in the second story, on lot in square 57, in the city of Indianapolis." The Supreme Court said in that case: "Many insufficiencies might be pointed out in this complaint, but it is enough to say that it does not describe the property with any reasonable degree of certainty. Nor does it state in what county or State it is situated. This is fatal, and is not cured by answer."

In the case at bar the county is sufficiently identified by locating the property in the city of Indianapolis, and State of Indiana. The State being given, the Court will judicially take notice that the city of Indianapolis is in Marion county. *Indianapolis & Cincinnati Railroad Co., v. Case*, 15 Ind., 42; *same v. Stevens*, 28 id., 430; *Hays v. The State*, 8th id. 425.

But the complaint is still defective in the matter of description.

The property sought to be recovered is nowhere described except in the notice, and there are no averments connecting

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the premises named in the notice with the preceding allegations.

The word "said," in the first sentence of the complaint, has no antecedent, and consequently refers to nothing.

The words "their premises," in the same sentence, are not supported by an averment that they are the same premises mentioned in the commencement as being held by the defendants as tenants of the plaintiff.

That part of the complaint following the notice fails to state facts showing a right of possession in the plaintiff, and as the notice is not connected by proper averments with the preceding portion alleging a tenancy, there is really nothing in the complaint, but the notice and the charge that defendants failed to yield possession of the premises therein described.

The proceedings of Special Term must be reversed back to the first error. 2 G. & H., Statute 276, Sec. 569. That error was in overruling the demurrer to the complaint.

The judgment is, therefore, reversed, with costs, with instructions to sustain the demurrer, and give the plaintiff leave to amend.

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IN GENERAL TERM, 1873.

GEORGE W. HILL, Appellant, v. CHARLES W. STAGG.**MECHANICS' LIEN—****NOTICE—****PRACTICE.**

In an action to enforce a mechanics' lien, the notice must be filed within sixty days from the date of the last item of the account for work done or materials furnished, or if a credit be given, from the expiration of the credit. The debt becomes due on the delivery of the materials, if no time is given by contract, when the year within which suit must be brought, commences to run.

The law of mechanics' lien is to give security, not only to the mechanic for a reasonable period, but to subsequent purchasers after that period, and the notice of lien, therefore, should so describe the claim as to inform the public to which class it belongs, whether of claims due, or not due and any ambiguities in such notice will operate to the prejudice of the authors of them, rather than to that of the public.

A notice to acquire a mechanics' lien cannot be reformed, as a mortgage created by the act of the owner can be to make it conform to intention—it must meet the requirements of the Statute.

It is discretionary with the Court to permit an answer to be withdrawn, and a demurrer instead to be filed.

E. A. Parker, for appellant.

Morrow & Trusler, for appellee.

PERKINS, J.—On the 21st of November, 1871, George W.

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Hill filed in the Recorder's office of Marion county, a notice of which the following is a copy :

INDIANAPOLIS, November 20, 1871.

To Charles W. Stagg, and all others concerned :

You are hereby notified, that Jacob Coffman, whom you employed to erect a dwelling house on lots 10 and 11, in square 13, Drake's addition to the city of Indianapolis, Marion county, Indiana, is indebted to me in the sum of eight hundred dollars, on account of lumber furnished him, and which was used in the erection and construction of said dwelling house ; and that I hold you and said property responsible to me for the payment of said \$800. Said lumber so furnished, was furnished by me at the special instance and request of said Coffman, contractor, as aforesaid, and within the last sixty days. GEORGE W. HILL.

On the 18th day of November, 1872, said George W. Hill commenced a suit to enforce a mechanics' lien for the amount specified in said notice, upon the house of Stagg, making one Cynthia A. Hedges, who claimed some interest in the property, a co-defendant.

The account on which the suit was based, did not show that the articles composing it were sold on a credit, but the complaint contained an averment that such was the fact. The cause was put at issue by answer and replication.

Afterward, the Court permitted the answer to be withdrawn, and a demurrer to be filed to the complaint.

This action of the Court is assigned for error.

It was a matter in the discretion of the Court. *Morris v. Graves, 2 Ind., 354.*

The Court sustained the demurrer to the complaint, which ruling was excepted to, and, the plaintiff failing to amend, final judgment was entered for the defendant. This ruling, upon demurrer, presents the remaining question for decision

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in the cause. Conceding, for the purposes of this case, that a lien had been created, was the suit for its enforcement commenced in time?

Section 651, 3 Statutes of Indiana, page 337, under which this suit was instituted, reads thus :

“ Any person having such lien, (mechanics’ lien) may enforce the same by filing his complaint, &c., at any time within one year from the completion of the work or furnishing the materials; or, if a credit be given, from the expiration of the credit.”

The first item of the account sued on is dated August 31, 1871, and the last is dated October 13, 1871. This suit, as we have before stated, was instituted on the 18th of November, 1872, over a month more than a year from the date of the last item of the account sued on.

As neither the notice filed to acquire the lien, nor the account filed with the complaint, shows that any credit was given on the account, it purports to have become due at the date of the last item. This was decided in *Mooney v. Myers*, 5 Blackf., 331, a mechanics’ lien case. Judge Sullivan, in delivering the opinion of the Court says :

“ Where in a contract for the sale of goods, no time is given for payment the law implies a contract to pay for them on delivery. The debt, then, having become due on the delivery of the materials, the notice should have been filed within sixty days from that time.”

So, in this case, the debt having become due according to the notice, at the date of the last item of the account, it would seem that this suit should have been instituted within one year from that date.

But it is contended that though the notice filed to acquire a lien, describes the claim as being due, still, that that notice may be varied by parol evidence; that the claim described therein as due, may be shown, by such evidence, under a

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proper averment in the complaint, to be payable after the expiration of a credit, and that the quit was thus brought in time. But this doctrine is in conflict with the case of *Wade v. Reitz*, 18 *Ind.*, 307, in which it is said: "The statute giving a mechanics' lien contemplates two classes of claims, due and not due; and the notice should so describe the claim as to inform the public to which class it belongs; and ambiguities should operate to the prejudice of the authors of them, rather than to that of the public."

This decision was made about eleven years ago, and has not, as we are advised, been overruled. Nor do we think it should be disregarded by this Court.

What appears to have been the object of the Legislature in authorizing the creation of these mechanics' liens, and prescribing the mode, and limit as to time, of their enforcement? Plainly to give security to the mechanic for a reasonable period, and protection to subsequent purchasers and incumbrancers after that period. The Statute authorizes the mechanic to file his lien within sixty days, &c., and to enforce it by suit within one year from the time it becomes due. If not enforced by suit within that period of time, the lien expires by mere operation of law, without any act of the parties; and they are created, and they die upon a public record, that the public may be definitely informed of each event. But if, in taking his lien, the mechanic can describe it as due at one time, and then, in his suit to enforce it, prove it due in fact by private contract between the parties, at another, perhaps a time six years later, of what use is the notice as a means of information as to when the lien will expire by delay in bringing suit?

Certainly, public policy requires that such a practice, under the mechanics' lien act, should be required, as will tend to secure stability to titles to land, prevent fraud, and facilitate its sale and purchase, and especially, where such practice imposes no hardship on the party taking the lien.

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As analagous in principle, we may cite those cases, and they are numerous, where the notice to acquire the lien fails to describe with accuracy and definiteness, the property on which the lien is sought to be acquired.

It should be remembered that these mechanics' liens are not created, as in case of mortgages, by the voluntary act of the owner of the property, but forced upon it, *in invitum* the owner, by the *ex parte* act of the creditor; hence, he should be held strictly to the lien he has thus created, both as against the owner of the property and the public. Accordingly, it was held in *Lindley v. Cross*, 31 *Ind.*, 106, in a suit against the owner of the property, where the right of no third party intervened, that a notice to acquire a mechanics' lien could not be reformed, as a mortgage created by the act of the owner could have been, to make it conform to intention. The Court says: "The lien of the mechanic or material man is created by Statute, and before either can avail himself of such a lien the Statute must be complied with. The notice charged in each paragraph of the complaint was insufficient to create the lien, and the Court had no power to reform it." See, also, *Munger v. Green*, 20 *Ind.*, 38; *Hornell v. Zerbee*, 26 *Ind.*, 214.

The judgment at Special Term is affirmed.

Fletcher et al. v. Finch, and Schooley.

IN GENERAL TERM. 1873.

STOUGHTON A. FLETCHER ET AL, v. GEORGE W. ZEIGLER,
FABIUS M. FINCH AND THOMAS SCHOOLEY, Appellants.

PROMISSORY NOTE—*sureties, liability on—*
SURETIES—*contribution, between.*

Suit on a note made by A, and B to C and indorsed by C to the plaintiffs. C answers that his co-defendants were the makers of the note, and are primarily liable, and that he is only an accommodation indorser, and that they be first exhausted to pay said note. B answering—denies C's averments, and avers *inter alia*, that A is the principal, and that he is a co-surety with C, and that before suit, this defendant paid one-half of said note and costs, and that execution should now be levied on the goods of C for the residue.

Demurrer by C to these answers was overruled.

Held: There was nothing material in these answers, but what was clearly admissible under the general denial. The Statute does not authorize the Court to say that the debt shall be first levied of the goods of one, or more of the sureties. The creditor has a right to hold all the sureties for all the debt until it is all paid. The defendants were all liable, and as to the plaintiff, parol evidence was inadmissible to vary the liability which the law attaches to the parties from the position in which their names appear upon the paper.

As between themselves, the rule is different, and the Statute gives parties liable upon paper an easy and convenient remedy for sureties to have their liability, as to other parties, tried and determined.

Held: The Statute does not authorize the Court to interfere with, or delay the remedy of the creditor in order to settle questions of contribution between sureties. It is only where one surety has paid more than his share, that he has a claim for contribution, there was no error in the ruling of the Court on these demurrers.

Hanna & Knefler, for appellants.

Taylor, Rand & Taylor, for appellee.

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BLAIR, J.—This is a suit upon a negotiable promissory note, purporting to be made by Zeigler, and Finch, payable to Schooley, and by him indorsed to the plaintiffs.

The defendant, Schooley, answered by way of cross-complaint, under the provisions of Sections 674 and 675 of the Code, (2 G. & H.) that his co-defendants Zeigler, and Finch, were makers of the note, and primarily liable, and that he is only an accommodation indorser, or surety, and he asks that his co-defendants be first exhausted, &c.

To this cross-complaint the defendant, Finch, filed an answer in three paragraphs, the first a general denial, and the other two setting up in substance, that the note was made by Zeigler for money loaned him, and that he (Finch) signed the note as surety for Zeigler, and as a co-surety with Schooley, of which facts he avers Schooley had full knowledge, and that before suit he paid in full, one-half the amount of said note, and costs of protest, and he asks that execution may be first levied on the goods of Schooley for the residue.

A demurrer of Schooley was overruled to each of these paragraphs. This ruling is the first error assigned.

There was nothing material in these answers, but what was admissible under the general denial. The statute before cited only authorizes an order to be made that the debt shall be first levied of the goods of the principal. It does not authorize the Court to say that the debt shall be first levied of the goods of one, or more of the sureties. The creditor has a right to hold all the sureties for all of the debt, until it is all paid. He cannot be compelled to have his debt levied of the goods of each surety, as he may be in turn liable, thus probably having his payment delayed.

The allegation of the payment of one-half of the debt was, therefore, mere surplusage, and Schooley was not, nor could he have been injured by the ruling on the demurrer.

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The defendants were all liable to the plaintiffs upon the note, and the authorities cited by the appellant Schooley, show that as to the plaintiff, parol evidence was inadmissible to vary the liability which the law attaches to the parties from the position in which their names appear upon the paper. This is now the law in this State. *Drake v. Markle*, 21 Ind., 433; *Smith v. The Muncie National Bank*, 29 Ind., 158; *Bowser et al. v. Rendell*, 31 Ind., 128; As between themselves, however, the rule is different, and the statute before cited gives parties liable upon paper, an easy and convenient remedy for sureties to have their liability as to other parties tried, and determined. *Harker v. Glidewell et al.*, 23 Ind., 219.

There was no error, therefore, in the ruling of the Court on the demurrers.

The Court, on the trial of the cause, found that Schooley and Finch were co-sureties for the defendant Zeigler.

The next error assigned is the overruling of the defendant Schooley's motion for a new trial. The only additional question raised upon this ruling is the sufficiency of the evidence.

We have examined the evidence, and think the finding was fully sustained. The testimony of the defendant, Schooley, is to the effect, that Zeigler represented to him that Finch was to be a maker of the note, and that he indorsed it on the faith of such representations. Finch's name was not then on the note, and there is no evidence tending to show that Finch authorized Zeigler to make any statements that he would join as a maker; and it is clear from the evidence that Finch only signed as a surety for Zeigler.

The defendant, Finch, made a motion for an order that execution be first levied of the goods of Schooley. This motion was overruled, and the ruling is assigned as error by the defendant, Finch.

The statute does not authorize the Court to interfere with,

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or delay the remedy of the creditor, in order to settle questions of contribution between sureties, in a suit by the creditor. It is only where one surety has paid more than his share, that he has a claim for contribution. Finch only shows that he has paid his full share.

For these, and other reasons heretofore given in reference to the allegations in the pleadings, we think there was no error in overruling the motion.

Judgment affirmed.

NOTE—"The surety's right to *re-imbursement* from the principal accrues, *toties quoties*, he is compelled to make a payment; with regard to his right to contribution, it is different, for until one has paid more than his proportion, either of the whole debt, or of the part which remains due from his principal, it is not clear that he ever will be entitled to demand anything from the other, and before that, he has no equity to receive a contribution, and consequently no right of action which is founded on the equity to secure it."

"Whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not until then, it is also clear, that such part ought to be repaid by the others, and the action will lie for it." See *Smith's Mer. Law*, p. 586-7, and authorities cited.

The surety in such case may compel contribution without showing an inability in the principal to pay. Note marginal page 523, *Chitty on Contracts*, contra in same note; see, further, *Chitty on Contracts*, marginal page 523, 524 and *Sedgwick on Damages*, 341, and notes.—REPORTER.

Campbell v. Miller.

IN GENERAL TERM, 1873.

JOHN D. CAMPBELL v. ADAM R. MILLER, Appellant.

CONTRACT—*non-performance of*—

On a contract of purchase, and sale, neither party can sustain a suit on the agreement for non-performance, without having first performed, or offered to perform, his part of the obligation.

A. F. Denny, for appellant.

Hanna & Knefler, for appellee.

NEWCOMB, J.—Campbell sued Miller on the following instrument:

“MR. A. R. MILLER—I will give my lot on Pennsylvania street, and will assume an incumbrance of four thousand dollars on lot No. 4, in Adamson's sub-division, in the city of Indianapolis, and will pay the \$28.00 interest that is now due on the \$400 note to the State of Indiana, you paying the interest that is now due on the \$3,600, (being \$360,) for your house and lot, situated at No. 331 North Pennsylvania street. You assume my taxes and street improvements for 1870, and I will do the same on yours, and will take possession of your property on the 20th day of October, 1870, and the said Miller obligating to pay me \$400 for the 120 acres of land in Shannon county, Missouri, on the first day of August, 1872, provided it is not sold before that time, and Miller paying the interest on the State of Indiana note for the year 1872.

J. D. CAMPBELL.”

September 22, 1870.

“I accept the above proposition.

A. R. MILLER.”

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By way of explanation of the vagueness of the written contract, the complaint contains averments to the effect following: That Campbell was the owner of the property on Pennsylvania street, which he proposed to convey to Miller and which was wholly unencumbered; and that Miller was the owner of said lot No. 4, in Adamson's subdivision, which was largely encumbered, to-wit: *First*, by a mortgage to Mrs. Claypool in the principal sum of \$3,600, with accrued interest to the amount of \$360; and, *Second*, by a mortgage to the State in the sum of \$400, with accrued interest to the amount of \$28.00; that the defendant, Miller, then expressed a desire to pay off the said \$400, and represented that he was the owner of 120 acres of land in Shannon county, Missouri, and agreed to convey the said 120 acres to the plaintiff, Campbell, and if plaintiff should not sell the land for \$400 on, or before August 1, 1872, that he (Miller) would then pay Campbell said \$400 for the said land, if he (Campbell) should have to pay the said \$400 to the State, and that with this *understanding and agreement*, the plaintiff proposed to *assume*, and *pay* the said \$3,600 lien, and said \$400 lien, together with the \$28.00 accrued interest thereon; that each of the parties had this *understanding of the facts* at the time of the making of the said proposition by plaintiff to defendant; that plaintiff was not then the owner of said 120 acres, but that the defendant was to convey the same to the plaintiff, and that *it was upon the faith that he would do so*, and upon the *faith* that the defendant would pay plaintiff \$400 therefor on August 1, 1872, if plaintiff should not sell the same for that amount before that time; that the plaintiff agreed, and assumed to pay the said \$400 to the State, together with the other sums aforesaid.

Plaintiff avers that it was upon this *understanding of the said contract* that he (defendant) afterward conveyed to plaintiff his said lot No. 4, and he (plaintiff) *afterward assumed*

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and paid the said Claypool lien, and the defendant not having paid the said \$400, and plaintiff having been wholly unable to sell the said 120 acres of land for \$400, or for anything, and defendant failing to pay plaintiff \$400 on August 1, 1872, the plaintiff paid the State the said \$400 with interest.

Plaintiff then alleges and gives a more particular description of the 120 acres, and says that by the description given, he (the defendant) in pursuance of the *understanding of the contract* conveyed to him (plaintiff) the said 120 acres on *April 29th, 1871, by his deed of that date.*

A deed for the 120 acres of land was tendered with the complaint, and brought into Court; and the complaint states that no part of the \$400 has been paid by Miller.

Prayer that the written contract be so reformed as to express the understanding, and agreement of the parties as stated, and that plaintiff have judgment against the defendant for said sum of \$400, and interest thereon.

A demurrer to the complaint was overruled, and the defendant excepted.

On the issues of fact formed there was a finding for the plaintiff for \$410.63, and judgment on the finding, over defendant's motion for a new trial.

We think the written memorandum, with or without the extrinsic facts stated in the complaint, shows an agreement by Miller to purchase the 120 acres of Missouri land of Campbell, at the price of \$400, on the first day of August 1872, in case Campbell should not otherwise sell the same before that date.

It being a contract of purchase and sale, neither party could sue the other for non-performance, until he had first offered to perform his part of the obligation. A vendor cannot maintain an action against his vendee for the purchase money, when the whole thereof is due, without averring and proving a tender of a conveyance before suit brought.

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Shirley v. Shirley, 7 Blackf., 452; *Cox v. Hazard*, id. 408; *Ireland v. Chauncey*, 4 Ind., 224; *Bert v. Ellsworth*, id. 261; *Mix v. Ellsworth*, 5th, id. 517; *Mather v. Scales*, 35th, id. 1; *McCulloch v. Dawson*, 1 id. 413.

The complaint failed to aver a tender to Miller of a deed before suit. The demurrer should, therefore, have been sustained.

The judgment at Special Term is reversed, and remanded with instructions to sustain the demurrer to the complaint.

NOTE.—See *Chitty on Contracts*, p. 315, and notes.

In an action against the vendee for the purchase money, the vendor must show that he has prepared and tendered a deed of conveyance, or has offered to prepare and tender such deed, and has been discharged, or excused from preparing, and tendering it by the acts, or conduct of the vendee. *Green v. Reynolds*, 2 John., 207; *Johnson v. Wygant*, 16 Wendell, 48; *Hunt v. Livermore*, 5 Pick., 395; *Warner v. Hatfield*, 4 Blackf., 392. See, also, *Tinney v. Ashley*, 15 Pick., 546; *Sugden on Vendors*, Ch. 4.

What will satisfy an agreement to sell and convey? See *Chitty on Contracts*, and notes on pp. 316, 324, inclusive.

The rule of damages is the purchase money agreed to be paid, and interest thereon, from the time of default in not fulfilling the agreement—(this where the deed has been made and tendered by the vendor). 4 *Greenleaf*, 258; 15 *Maine*, (*Robinson v. Heard*) 296; 33 *Maine*, (*Oatman v. Walker*) 67. See, also, *Fletcher v. Button*, 6 Barb., *Sup. Ct. Reports*, 646.

For cases in which the language used in agreements, or covenants to convey has been construed by different courts. See note on page 319, *Chitty on Contracts*.

"Where the vendor acted in bad faith, the plaintiff would be entitled to recover, by way of damages, the difference between the contract price, and the enhanced value when the conveyance should have been made." See *Baldwin v. Munn*, 2 Wend., 399; *Brinkerhoff v. Phelps*, 24 Barb., 100; 43 Barb., 469; also, *Foley v. McKegan*, 4 Iowa, 1; see *Sedgwick on Damages*, tit. "Contracts for sale of land," p. 195, et seq. See *Hilliard on Vendors*, chaps. 12, 14 and 25, and pp. 27 and 572.

An averment of readiness to perform is not sufficient. Where an agreement is to be executed on both sides at the same time, neither party can maintain an action without showing performance, or an offer to perform on his part. *Van Schaick v. Winne*, 16 Barb., 89, 93.

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A sufficient performance by actual surrender, or tender and refusal, must be averred in the declaration, as well as the further averment showing *what* title he had to convey. *Phillips v. Fielding*, 2 H., *Blackstone*, 123. See, further, *Hilliard on Vendors*, p. 575, *et seq.*, and notes; see *Fry on Specific Performance*, p. 133, Sec. 383, *et seq.*, p. 188, Sec. 608, *et seq.*—REPORTER.

IN GENERAL TERM, 1873.

GRAFTON JOHNSON, Appellant, v. ADAM R. MILLER, ET UX.

MORTGAGE—*application of rents on—*

MORTGAGEE—*accounting by.*

A mortgagor is not bound to account for rents and profits while he is in possession of the mortgaged premises.

A mortgagee must account for the rents and profits, from the time he takes possession of the mortgaged estate, and he will be charged an occupation rent for any portion of it held by himself. If there be no interest due at the time the mortgagee takes possession, and the annual rents exceed the amount of annual interest payable on the mortgage, such rents will be directed by the Court, in order that the excess may be applied in sinking the principal.

Annual rents are directed in an account of occupation rent, as well as in an account of rents and profits received.

Finch & Finch, for appellant.

A. F. Denny, for appellee.

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PERKINS, J.—Suit to foreclose a mortgage. The facts are as follows :

On the 25th day of August, 1871, Lizzie E. and Adam R. Miller executed a mortgage on a lot and house in Indianapolis, to secure the payment of a note executed by the mortgagors to Grafton Johnson, the mortgagee, for \$1000, due in six months, with ten per cent. interest after maturity, and reasonable attorney's fees if suit should be instituted, &c.

On the same day, and as further security for the payment of said note, the mortgagors surrendered the possession of the mortgaged premises to the mortgagee, and thenceforward occupied them as his tenant at \$35 per month. This was the legal effect of the action of the parties touching the occupancy of the mortgaged premises by the mortgagors. As further collateral security, the mortgagors delivered also to the mortgagee, a note on a third person for between four and five hundred dollars. There was no special agreement as to how the rent of the house, or the proceeds of the collateral note, should be applied.

That we are right in our construction of the agreement as to the possession, and rent of the mortgaged premises, we quote the brief of appellant. "The parties agree in this: Plaintiff loans a sum of money to defendants; as security for this loan defendants execute the note, and mortgage; as *further security* they put plaintiff in possession of the mortgaged premises. By the same agreement, by which they put plaintiff in possession, they agree themselves to occupy as his tenants, and pay monthly the rent at \$35 per month."

The point in dispute in the case is this: The plaintiff (appellant here) claims that he is entitled to receive the \$35 per month rent, in addition to the interest reserved in the note and mortgage, for the use of the money.

We need not inquire whether an agreement to that effect, had one been made, so unconscionable as it would have been,

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could have been upheld. Without such agreement, we must apply to the case the general rule of law, which is, that a mortgagee in possession must account for rents and profits. *McCormack v. Digby*, 8 *Blackf.*, 99. No such agreement is satisfactorily shown in this case.

This subject is fully discussed, and the cases collected, in the Second Part of volume Two, *Leading Cases in Equity*, top page 430. We quote: "The mortgagor is not bound to account for rents and profits while he is in possession. *Colman v. Duke of St. Albans*, 3 *Ves.*, 25; *ex parte, Wilson*, 2 *V. & B.*, 252. The mortgagee, however, must account from the time he takes possession, for the rents and profits of the mortgaged estate; and he will be charged an occupation rent for any portion of it held by himself; *Smart v. Hunt*, 1 *Vern.*, 418; *Trulock v. Robey*, 15 *Sim.*, 237, 265; and annual rents will be directed by the Court, if there be no interest due at the time he takes possession, and the annual rents exceed the amount of the annual interest payable on the mortgage, in order that the excess of rent may be applied in sinking the principal. *Shepherd v. Elliott*, 4 *Madd.*, 254; *Gould v. Tancred*, 2 *Atk.*, 533; and annual rents are directed in an account of occupation rent, as well as in an account of rents and profits received. *Wilson v. Metcalfe*, 1 *Russ.*, 530."

The judgment is affirmed.

NOTE.—See *Chitty on Contracts*, *mar. p.* 292; *Hilliard on Mortgages*, Vol. 1, *Chap.* 9.

IN GENERAL TERM, 1873.

JASON H. GREENSTREET, Appellant, v. JOHN C. NORRIS.

CONTRACT—*specific performance*—

PRACTICE—

PLEADING.

Defendant filed a general denial, also a special answer, denying compliance of plaintiff with contract, and failure to pay, or tender the sum stipulated, and to execute notes for the balance of purchase money, within a reasonable time, or at any time; that before said suit, said property increased in value, and for that, and other reasons set forth, defendant rescinded, and set aside said alleged contract. Demurrer to this answer overruled, and judgment for defendant. Plaintiff appealed.

Held: That this paragraph amounts at least to the general denial, and if a special paragraph of answer amounting to the general denial is good on general demurrer—which under our code all demurrers are—then the Court committed no error in overruling the demurrer.

Under the code if a special plea, amounting to the general issue, be pleaded with the general issue, objection should be taken to it by motion, not by demurrer.

James Buchanan, for appellant.

Taylor, Rand & Taylor, for appellee.

PERKINS, J.—Complaint for specific performance. Judgment for defendant at Special Term.

The case on appeal is this:

On the 9th day of April, 1872, John H. Greenstreet, the plaintiff, addressed a letter to John C. Norris, the defendant, then at Cincinnati, Ohio, containing a proposition to purchase a lot of his on Delaware street, Indianapolis.

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To this letter, Norris replied on the following day, April 10, as follows :

"I received your letter wanting to know at what price, and on what terms, I would sell you my lot on Delaware street, in Indianapolis, and stating on what terms you would like to buy it. I will sell it to you at sixty dollars (\$60) per foot, and give the terms you ask in your letter, and you can go to work as soon as you please. I will be up myself when Mrs. Suitor comes up. My daughter, Mrs. Thompson, died yesterday morning, and she (Mrs. Suitor) will not come up until everything is settled.

Yours, &c.,

JOHN C. NORRIS."

The reply to this letter follows :


"INDIANAPOLIS, April 12, 1872.

John C. Norris, Cincinnati :

Your favor of the 10th inst., received and noted. Your offer to sell me your Delaware street lot at sixty dollars per front foot, five hundred dollars cash, balance on one, two, three and four years time, with six per cent. interest (the terms proposed in his first letter) is accepted. I will consider, then, that the purchase is made, and will make my arrangements in accordance with this understanding. You can, by attaching the necessary papers, make sight draft on me for the cash payment, or this can be arranged when you come, as you prefer.

JOHN H. GREENSTREET."

The complaint avers that no reply was received to this letter, and no draft was sent; that Greenstreet took possession of the lot and made improvements; that afterward Norris came to Indianapolis; that Greenstreet, tendered him the \$500, offered to execute note and mortgage, in short, to fulfill his part of the contract, and demanded a



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deed, &c., but Norris refused, &c., and that he, plaintiff, is still ready, and offers, &c.

To this complaint defendant, Norris, answered, the general denial, and, secondly, "that the said plaintiff did not comply with the terms of said alleged contract, and failed to pay or tender said sum of money, and to execute notes for the said deferred payments, and to secure same by mortgage on said real estate, or otherwise, within a reasonable time, or at any time after making said alleged contract, and before said suit was brought; and said real estate advanced, and increased largely in value, above and beyond the price said plaintiff proposed, and agreed to pay therefor, and for that reason, and on account of the matters aforesaid, this defendant did rescind, set aside, and abandon the said alleged contract, as he had full and lawful right to do; and this he is ready to verify, wherefore, he demands judgment," &c.

To this second paragraph of answer, a demurrer, assigning for cause insufficiency of facts to constitute a defense, was overruled, and exceptions taken. The cause was tried upon the general denial, and final judgment rendered for the defendant.

This suit, it should be observed, was commenced on the 17th day of May, 1872, a little over a month after the making of the contract; and the refusal of Norris to make the deed was prior to that, and before any very great change in the value of the property could probably have occurred. Could that fact, if true, have had any legitimate influence in determining the case? See *Lintner v. Potts*, 5 *Blackf.*, 396.

The assignment of error in the record is, that "the Court erred in overruling plaintiff's demurrer to the second paragraph of defendant's answer, to which ruling plaintiff at the time excepted."

This paragraph amounts, at least, to the general denial;

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and if a special paragraph of answer, amounting to the general denial, is good on general demurrer, which, under the code all demurrers are, then the Court committed no error in overruling the demurrer. At common law the point is unsettled, whether a special plea, amounting to general issue, must be got rid of by demurrer, or motion. *Stephens on Pleading*, 421; *Gould on Pleading*, 4 Ed., p. 325, Sec. 87; 1 *Chitty on Pleading*, 528. It would seem from this latter author, that the objection might be taken by special demurrer; and if it required a special demurrer at common law, it would have to be taken by motion under the code. In *Estep v. Estep*, 23 Ind., 114, the Court said that special demurrers are not contemplated by the code, but motions are the substitute for them. See, also, *Fultz v. Wycoff*, 25 Ind., 321. But the practice at common law had been settled in this State as early as 1845. *Jackson v. Yandis*, 7 Blackf., 526. In *Crookshank v. Kellogg*, 8 Blackf., 256, the general issue was pleaded, and a special plea. Demurrer to the special plea. The Court, by Blackford, Justice: "The plea is substantially a bar to the action, not, however, because it shows the defendant to be justifiable in what he did, but because it shows that he did not commit the trespass alleged against him. It is bad in form as amounting to the general issue; but it is not objected to on that ground, (which the Judge says in the syllabus should have been taken by motion). The demurrer, therefore, should have been overruled."

We cannot say, therefore, that the Court erred in the case at bar in overruling the demurrer.

The judgment is affirmed.

NOTE.—"It is no objection to a plea that the matter of it may be given in evidence under the general issue. The right to plead as many pleas as defendant may deem necessary for his defense, is secured to him by statute. In so pleading, however, it is not his privilege to encumber the record with tautologous allegations, nor with pleas, which, while they pretend to be

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special, amount only to a denial of the plaintiff's allegation" * * * A plea amounting to the general issue, is a plea alleging matter which is, in effect, a denial of the whole, or the principal part of the allegations in the declaration." * * * 7 *Blackf.*, 828.

"There is a great difference between the case of a plea which amounts to the general issue, and a plea that discloses matter which may be given in evidence under the general issue;" under the latter, various things may be given in evidence, which may also be proved under the general issue, "but it is incorrect language to say that these things amount to the general issue they only defeat the contract; but what, in correct language, may be said to amount to the general issue is, that from some reason specially stated, the contract does not exist in the form in which it is alleged, and where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed." *Lord Denman in Hayselden v. Staff*, 5 *Adol & Ellis*, 158; see 22 *Ind.*, 114; 25 *Ind.*, 321; *Stephen on Pleading*, 421; *Gould on Pleading*, 4 *Ed.*, p. 325, Sec. 87 *Chitty on Pleading*, 528; 7 *Blackf.*, 526; 8 *do.* 256.

IN GENERAL TERM, 1873.

JOHN B. MAZELIN v. LYMAN MARTIN, Appellant.

PROMISSORY NOTE—*extension of payment; forbearance—*

SHERIFF'S SALE—*purchasers at, for what held—*

ASSIGNMENT OF ERROR—*what necessary.*

A promissory note falling due May 1, 1872, was on that day endorsed.

"This note extended until the first day of September, 1872, at 10 per cent. interest, the payment of the within note assumed by A." Signed A.

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In a suit to recover on said agreement, A, the defendant, answered, that he indorsed the note as surety only, for the maker.

Held: An answer that the contract was wholly executed without consideration as to him, A, is bad.

Any loss, trouble, or disadvantage undergone by, or charge imposed upon him to whom it is made, constitutes a good consideration.

It is immaterial whether the party making the promise, in consideration of forbearance, has any direct interest in such indulgence, or will be benefited by the delay incident thereto. It is enough that he requests such forbearance, for the benefit to the debtor will be supposed to extend to the promisor.

Purchasers of property at Sheriff's sale are not held for the value of the property, but for the amount bid.

Assigning as error, matters which are only good as reasons for a new trial is useless, and presents no question for review. If such reasons are embodied in a motion for a new trial, an assignment of error in overruling the motion, is all that is necessary to present the question.

George Carter, for appellee.

BLAIR, J.—The complaint in this case shows that one Henry Graves made certain promissory notes to John M. and Mary Ross, and also made a mortgage to secure the payment of the same. The note of the series last to become due, was assigned by the payees to the plaintiff before it became due. It became due on the first day of May, 1872. At that date the following indorsement was made thereon by the defendant:

"This note extended until the first day of September, 1872, at 10 per cent. interest, the payment of the within note assumed by Lyman Martin.

Signed,

LYMAN MARTIN."

Upon this agreement to assume the payment of the note, the plaintiff seeks to recover of the defendant.

A demurrer to the complaint was overruled, and this ruling is assigned as error. This point is not urged in the brief of appellant, and we see no objection to the complaint.

An answer in four paragraphs was then filed, to the last

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three of which, (the first being a general denial) demurrers were sustained.

In the second paragraph of answer, it is alleged by the defendant that he endorsed the note as surety only, for the maker.

This was an attempt to contradict, and vary the express terms of the agreement signed by the defendant, and hence was bad.

In a third paragraph he says the contract "was executed wholly without consideration as to him, said defendant."

The latter words, "as to him, said defendant," so limit the meaning of the plea, that it is not a good answer. "Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon, him to whom it is made," will constitute a good consideration. *Burrill's Law Dictionary*, tit.—Consideration; *Smith on Contracts*, 87, 88.

Again, in 1 *Parsons' on Contracts*, 443, the author says in reference to forbearance, "It is not material that the party, who makes the promise in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay." It is enough that he requests such forbearance; for the benefit to the debtor will be supposed to extend to the promissor.

The fourth paragraph of answer alleges, that the notes falling due prior to the one in suit, all of which were secured by a mortgage of certain real estate, were put in suit, and a decree of foreclosure rendered, and the mortgaged property sold at Sheriff's sale to satisfy said notes, and the plaintiff, with one Henry Graves, and other parties, unknown to the defendant, did conspire to cheat and defraud the defendant, and purchased the real estate at the Sheriff's sale for twenty-two hundred dollars, less than its reasonable market value, and, in pursuance of such conspiracy, induced the defendant

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to indorse the note as charged in the complaint, for the purpose of releasing Graves, the maker of the note, and to release the mortgaged property.

The answer in no way impeaches the regularity, and validity of the foreclosure proceedings, and sale by the Sheriff, nor did the contract of the defendant release either the mortgage security, or the maker of the note. Purchasers of property at a Sheriff's sale, are not held for the value of the property, but for the amount bid. The answer does not, therefore, allege facts from which fraud can be inferred, and the ruling on demurrer was right.

On the trial of the cause, judgment was rendered against the defendant, and a motion for a new trial was overruled.

The ruling upon this motion is not assigned as error.

Assigning as errors, matters which are only good as reasons in support of a motion for a new trial, is useless, and presents no question for review. If such reasons are embodied in a motion for a new trial, an assignment of error in overruling the motion, is all that is necessary to present the questions.

The judgment is affirmed.

Davidson v. Wildman.

IN GENERAL TERM, 1873.

THOMAS F. DAVIDSON v. JAMES A. WILDMAN, Auditor of State.

The act of March 10, 1873, increasing the salaries of Circuit Judges from \$2,000 to \$2,500, and repealing all laws in conflict therewith, which went into effect upon its passage, gave to said Judges the increased salary for the quarter ending March 31, 1873.

It is competent for the Legislature to fix the amount that should thereafter be paid for past services as well as for future services. The act of March 10, in repealing the old law, left no other law in force by which these salaries could be paid.

BLAIR, J.—The plaintiff is the Judge of the 21st Judicial Circuit of the State of Indiana, and as such judge, claims that he was on the first day of April last, entitled to be paid the full amount of the quarterly payment of the annual salary allowed him as such judge by the act of March 10, 1873. Prior to the act of March 10, the salary of Circuit Judges was two thousand dollars per annum, payable quarterly. On that day the salary was fixed at two thousand five hundred dollars, payable in like manner, and the 5th section of the act repealed "All acts, and parts of acts now in force, allowing any other or different compensation to such judges." On the first day of April following the passage of this act, the plaintiff's quarterly payment of salary became due, and payable. It is claimed by the defendant that the amount then to be paid plaintiff should be estimated on the basis of two thousand dollars per annum up to the 10th day of March, and that thereafter it should be estimated according to the last act at twenty-five hundred dollars per annum.

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We regard the position of the defendant as untenable. An annual salary is a fixed sum to be paid by the year, or at such stated periods less than a year, as may be fixed by law; as in this case to be paid quarterly. The plaintiff had been rendering services from the first day of January to the first day of April, 1873, for which period he had received no compensation. Before the day of payment arrived, the Legislature fixed the amount to be paid on the first day of April at the rate of twenty-five hundred dollars per annum, or six hundred and twenty-five dollars for the quarter, and repealed all laws allowing "any other or different compensation." If the plaintiff had been paid in advance for his services, the question would have been different; but not having been paid, it was competent for the Legislature to fix the amount that should thereafter be paid, for past services as well as for future services, and as the old law was repealed before the time of payment arrived, there was no law in force governing the amount to be paid, except the act of March 10, 1873, and under the provisions of that act he was entitled to receive the full amount of the quarterly payment, viz: Six hundred and twenty-five dollars. We are further strengthened in this view, that the Legislature by the 44th section of the act making general appropriations, which was passed on the same day with the act fixing the salaries of Circuit Judges, appropriated the same amounts for each of the years 1873 and 1874, to be applied to the payment of the salaries of the Circuit Judges, "at two thousand five hundred dollars each." This section sets apart and appropriates to each of the Circuit Judges who serve for the entire year 1873, the sum of \$2,500. Acts of 1873, page 9.

We are, therefore, clearly of the opinion, that the action of the Court at Special Term was right, and that the plaintiff was entitled to have his warrant drawn on the first day of April for the sum of six hundred and twenty-five dollars.

Judgment affirmed.

Dessauer v. Baker.

IN GENERAL TERM, 1873.

LEE DESSAUER v. T. BAKER, Appellant.

INN-KEEPER—*liability of.*

In an action to recover the value of a watch, and other articles of property lost while a guest at a hotel.

Held: That though an innkeeper may exonerate himself from liability for the loss of goods of his guests, by showing that the loss occurred without any fault or neglect of himself, or servants, or by negligent conduct of the plaintiff, he must, nevertheless, be held to answer, and is responsible for the conduct of another guest placed in a room already occupied, without the consent of the occupant, and recovery may be had for the value of property so lost.

Ray & Tarkington, for appellant.

Leathers, for appellee.

PERKINS, J.—Suit by a guest against an inn-keeper, upon his common law liability as such.

Judgment at Special Term against the defendant.

The case is this: On the third of February, 1873, between the hours of 7 and 8 o'clock P. M., Dessauer, the plaintiff, stopped at the Mason House, a hotel in Indianapolis, kept by the defendant, Baker, registered his name, and asked for a room by himself. The clerk responded that no such room could be furnished him, but that he could have a bed in room No. 59, a room in which there were three beds, one of which was already taken by a Mr. Underwood, and that no other person except Underwood, and himself should be put into the

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room that night. Thereupon the plaintiff consented to, and did occupy a bed in room No. 59. He went into the room about ten o'clock in the evening. Mr. Underwood was then in the room. On entering, the door was fastened by a bolt on the inside. The plaintiff and Underwood retired, each to a separate bed. A stove was in the middle of the room, with one of the beds on one side of it, one on the opposite side, and the third bed at the foot of the latter. Underwood took the bed that stood alone upon one side of the room. The plaintiff took the one opposite, and the third, the vacant bed, stood at the foot of the one occupied by the plaintiff. On retiring, the plaintiff laid a part of his clothes on the vacant bed, and hung up a part near it. His watch was in his vest pocket, and his pocket book, with a few dollars in money, and a one-thousand-mile railroad ticket, &c., in it, was in one of his pantaloons pockets. About twelve o'clock, in the night, a stranger, without baggage, came to the hotel, registered by the name of Allen, paid for lodging and breakfast, and was sent by the clerk, under the guidance of a porter, to room 59. Underwood arose, unbolted the door, let him in, and then re-bolted the door. The plaintiff was not sufficiently awakened to become aware of the fact of Allen's entrance. Allen, before going to bed, removed the plaintiff's clothes from the vacant bed to a chair. About five o'clock in the morning Allen arose and disappeared from the hotel.

Underwood heard a noise in the room in the latter part of the night, but does not know who, or what caused it. About two hours after the exit of Allen, Underwood, and the plaintiff got up and, dressed. Underwood had lost nothing. The plaintiff's pockets had been relieved of his watch, money, ticket, &c. The usual watch had been kept in the hotel during the night. Nothing further as to the robbery is disclosed.

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On the above facts, did the Court at Special Term err in finding against the defendant? On the facts stated, no conclusion could be drawn other than that the loss occurred by the act of a servant or guest, probably a guest, at the inn.

In the 23 Vt., 177, (*Merritt v. Claghorn*) the Court by Judge Redfield, says:

"The host is, we apprehend, upon principles of reason and justice, always liable for any acts of his servants, or guests. He employs such servants as he chooses, and is bound to take every quiet, and orderly guest which offers, and if he takes others, even in good faith, it ought not to be at the risk of his other guests, who derive no profit and have no concern whatever in their being there. In holding an innkeeper liable to this extent, all opinions concur. It is here the discrepancy begins." And in *McDaniels v. Robinson*, 26 Vt., p. 316, the same Court, by the same learned judge, says:

"The inn-keeper is liable for goods stolen from any part of his house, unless he expressly limit his responsibility, and this is assented to by the guest. (*Richmond v. Smith*, 15 Eng. Com. Law Rep. 144). He is responsible for money belonging to his guests; (*Kent v. Shuckard*, 22 E. C. L. R., 388), and he is responsible for the acts of every one within his house, unless introduced by the guest, as all the cases agrees. (*Townsen v. The Havre de Grace Bank*, 6 Harr. & Johnson, 47)."

The case last quoted from is one of those cited in *Laird v. Eichold*, 10 Ind., 212, as being in harmony with the views of the Court in that case. See *Huntington v. Drake*, 24 Ind., 347. See, also, *Gile v. Libby*, 36 Barb., (N. Y.) 70, a case more nearly like that at bar than any we have met with. It holds the absolute liability of the host for robberies, or larcenies committed by his servants, and guests upon guests. But it is not necessary, in this case, that we

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should, and we do not decide, that the liability of the host extends that far. That he is *prima facie* liable, and can relieve himself only by showing that the loss did not happen through any default of himself, or his servants, in the absence of negligence on the part of the injured guest, there is no doubt.

In this case, we think the host, through his servants, was at fault, in this; that the guest robbed, was told that no person would be put into room 59, to occupy the third, the vacant bed therein. This assurance occasioned the plaintiff to be less careful in the disposition for the night of the articles of property placed in the pockets of his clothes, than he otherwise might have been, indeed, to deposit his clothes, with the articles in the pockets, upon that bed, so that when, without any notice, and while the plaintiff was asleep, a third person was given that bed, those articles were exposed to his observation, made a temptation to him, and easy of appropriation.

The defendant objected, on the trial at Special Term, to any evidence of this assurance, on the part of the clerk of the hotel, that no person should be put into the room to occupy the third bed. He claimed that it was a special contract, not set out, or relied upon in the pleadings by either party. But we think it was properly admissible, as accounting for the possible want of care on the part of the plaintiff in securing for the night the property he lost, and the fault, not to say bad faith of the defendant, by which that want of care was induced.

The issues in the cause involved the question of negligence in both parties.

The judgment at Special Term is affirmed.

Thurston v. Boardman, and Coulon.

IN GENERAL TERM, 1873.

ROLLAND E. THURSTON, Appellant, v. OMER B. BOARDMAN
AND CHARLES G. COULON.

CONSTABLE—*levy by*—

EXECUTION—*levy under*—

JUDGMENT—

VENUE—*change of*.

Where a constable, in answer to a complaint in replevin, pleads that he levied upon the property, as the property of the plaintiff, to satisfy an execution issued upon a judgment rendered before a Justice of the Peace against the plaintiff, the execution upon which the levy is made is not a written instrument within the meaning of the statute requiring such to be filed with the pleadings. It is but evidence of the facts alleged in the answer, and need not be made a part of the answer.

When property has been levied upon, but not sold, and the time for completing the return upon an execution has not arrived, and the execution is still in the hands of the constable, no objection can be taken to the validity of the levy, because the return was not signed by the Constable.

If a constable holds an execution, legal on its face in all respects, it is sufficient to authorize a levy, and to justify such levy, it is not necessary for the constable to allege that the Justice of the Peace, who rendered the judgment, had jurisdiction of the cause wherein the judgment was rendered.

Where a Court has jurisdiction of the person and of the subject matter of the action, the defendant cannot stand by, and see a judgment rendered against himself, and an execution proper and legal in form issued upon the judgment, and after it has been levied upon his property, attempt by an action of replevin, to have another Court sit for the correction of errors, and reverse the proceedings of the Court that rendered the judgment.

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The validity of a judgment cannot be enquired into in this collateral way.

If a judgment is invalid or void, a party has his remedy by appeal, or other direct proceeding.

Applications for a change of venue cannot be repeated without some special cause.

BLAIR, J.—This is an action to recover the possession of certain articles of personal property.

In addition to the general denial, the defendants answered admitting the taking of the property, but alleging that the defendant, Boardman, is a Constable of Marion county, and the defendant, Coulon, is his deputy, and that the property was levied upon as the property of the plaintiff by virtue of an execution in favor of the State of Indiana, and against the plaintiff, which was issued by one Schmitts, a Justice of the Peace of Marion county, to satisfy a judgment rendered by said Justice in a cause wherein the State of Indiana was plaintiff, and the plaintiff herein was defendant.

A copy of the execution is filed with the answer.

A demurrer was overruled to this answer, and the proper exception having been taken, this ruling presents the first question for consideration. It is urged that the answer does not show a justification for the levy, and taking of the property, because the return upon the execution is not signed by the constable.

This question is not raised by the demurrer for two reasons. First, the execution is not properly a part of the answer. It is not a written instrument within the meaning of the statute requiring such, to be filed with the pleadings. It is but evidence of the facts alleged in the answer, and need not have been made a part of the answer. *Lytle v. Lytle et al.*, 37 Ind., 281. Secondly, the execution does not purport to have been returned. The property was only levied upon, not sold, and the time for completing, and signing the return had not arrived.

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The next objection is, that the execution is directed to "any Constable of Marion county."

This direction is, as required by the express terms of the Statute. 2 *G. & H.*, p. 601, *Sec. 72*.

It is again urged that the answer is bad because it fails to show that the Justice had jurisdiction of the cause wherein the judgment was rendered, upon which the execution issued.

This averment was not necessary. If the constable had an execution legal upon its face in all respects, it was sufficient to authorize a levy. *Gott v. Mitchell*, 7 *Blackf.*, 270.

The plaintiff filed a reply to this answer, the substance of which is, that before the trial of the cause in which the judgment was rendered, he filed an affidavit for a change of venue from the Justice, on account of his prejudice, interest, and bias against the plaintiff; that the Justice overruled the motion for a change of venue, and tried the cause; wherefore he says that after the filing of the affidavit the Justice had no jurisdiction, and the judgment, and execution are void. A copy of the proceedings before the Justice is filed with the reply.

A demurrer was sustained to this reply; and this is the next error assigned. The ruling upon this demurrer was right.

It is not denied but that the Court had jurisdiction of the person of the plaintiff, and of the offence against the State, with which the plaintiff was charged, and under such circumstances it is not for the plaintiff to stand by, and see a judgment rendered against himself, and an execution issued upon the judgment, proper, and legal in form, and after it has been levied upon his property, attempt, by an action of replevin, to have another Court sit for the correction of errors, and reverse the proceedings of the Court that rendered the judgment.

The validity of the judgment cannot be inquired into in this way. *Spaulding and others v. Baldwin*, 31 *Ind.*, 376.

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The transcript from the docket of the justice, does not contain the affidavit that was filed for a change of venue, but it shows that after a jury was summoned to try the cause, and after they were brought into Court, at the instance of the defendant, the affidavit, and motion for a change of venue was filed. The motion was overruled, and the transcript recites the following as a reason therefor: "it being evident to this Court, and fully shown by the affidavit, the defendant herein filed as a plea in bar, that said defendant has heretofore, at three different justices, pursued the same course of filing affidavits for a change of venue, as it seems to this Court, with the avowed purpose of defeating the laws of the State." It further appears from the transcript, that the jury was sworn to try the cause, "and the defendant having been arraigned for plea, and he being mute, and indifferent to his case," trial was had. If necessary for a decision of the questions before us, we would say, that if the facts are recited correctly in the transcript, the Justice was right in refusing the change of venue; for it would appear that the defendant was only trifling with the Court. If there is to be no end to the granting of changes of venue, criminals could escape punishment.

Applications for a change of venue cannot be repeated without some special cause. *Millison v. Holmes*, 1 Ind., 45.

If the judgment is invalid, or void, the defendant had his remedy by appeal, or possibly he may have had a remedy other than by appeal, but we are clear that his reply in this case was bad.

Judgment affirmed.

Seitz v. Schmidt.

IN GENERAL TERM, 1873.

CHRISTINA SEITZ v. JOHN GEORGE SCHMIDT, Appellant.

PLEADING—*amended*—

ERRORS.

A subsequent pleading, covering the entire ground of action, or defense, contained in the prior pleadings, will be regarded as substituted for such prior pleadings, which are not to be certified by the Clerk to the Appellate Court.

Errors alleged to have occurred on the trial below, cannot be corrected on appeal; the authority of the Court below hearing the cause, shall first be sought before resorting to an Appellate Court.

Milner, for appellant.*Leathers & Harvey*, for appellee.

PERKINS, J.—On the 21st of May, 1873, the plaintiff filed her complaint against George Schmidt, and Nicholas R. Ruckle.

She alleges in that complaint that on the 24th of October, 1867, Schmidt obtained a judgment in the Marion Court of Common Pleas, against Frederick Seitz, her husband, for four hundred and forty three dollars and sixty-six cents and costs, &c.; that about two years afterward she became, and still continued to be, the owner in fee simple in her own right, of a certain piece of real estate (particularly describing it)—that Schmidt afterward caused an execution to be issued on the judgment above named against her husband, and to be levied upon the said described property of the

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plaintiff, and on the 7th of December, 1872, caused the same to be sold by Sheriff Ruckle, as the property of her husband, Frederick Seitz, said Sheriff delivering a certificate of sale to the purchaser, &c. She prays that said sale, &c., be decreed to be null, &c., and the cloud removed from her title.

On the 4th of June, Ruckle filed a disclaimer.

On the 5th Schmidt filed a demurrer to the complaint, which was overruled.

On the 9th, Schmidt filed answer to which there was a rule to reply.

On the 16th of June, defendant filed a second paragraph of complaint, which was amended on the 18th.

This second paragraph of complaint alleges all the facts stated in the first paragraph, with dates, amounts, &c., and also alleges the further fact, that on the 23d of November, 1871, said Schmidt instituted suit in the Marion Civil Circuit Court, to subject the property of the said plaintiff Christina Seitz, described in the first, and also in the second paragraph of the complaint, in this suit, to the payment of said judgment against her husband, which suit was tried, and judgment therein rendered against said Schmidt on the 24th of October, 1872, a transcript of which judgment is made a part of said second paragraph of complaint, which paragraph contains the same prayer for relief as did the first paragraph.

On the 21st of June, a demurrer was filed to this second paragraph of complaint, which was overruled on the 5th of July.

On the 7th of July, defendant Schmidt, elected to stand by his demurrer to said second paragraph, and thereupon the Court proceeded to render final judgment, and decree in the case against him.

No exception was taken to this proceeding of the Court, and no motion was made at Special Term to set it aside,

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and no steps were taken to procure a trial, or judgment on the first paragraph of complaint. No motion was made for judgment for want of a reply. The defendant afterwards appealed to General Term.

He assigns for errors :

1. The overruling the demurrer to the first paragraph of complaint. .
2. The overruling the demurrer to the second paragraph of complaint.
3. The rendering final judgment in the cause while the answer of defendant, Schmidt, to the first paragraph of complaint, was unreplied to.

Section 559, p. 273, 2 G. & H., contains this provision :
“ Neither shall the Clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleading first filed, and the amendments thereto; but shall certify such amended pleading only. Every paper and pleading above excepted, may be made part of the record by exceptions, or order of the Court, on motion.

This provision rests upon the theory that a subsequent pleading, containing the entire ground of action or defense contained in the prior, shall be regarded as substituted for prior pleadings, attempting to set forth such ground of action or defense. This case falls within this provision. The so-called second paragraph was really, and plainly understood to be, a substituted complaint. This disposes of the first, and third assignments of error, and as to the second, we think the demurrer to the second paragraph, so called, was rightly overruled.

Another rule of practice also would preclude a reversal of this cause. As we have stated, no exception was taken, or objection made to the action of the Court at Special Term, in rendering the final decree that was entered, and the Court

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was not asked to correct its errors, if errors were, in fact, committed.

In *Harlan v. Edwards*, 13 *Ind.*, 430, it is said, "the authority of the Court below should first be invoked (to correct such errors) before resorting to an appeal."

So in *Black v. Jackson*, 17 *Ind.*, 13, it is said, "errors in the amount, and form of the assessment, and judgment are complained of, but the record does not show any attempt to be relieved therefrom, in the Court below, and therefore we cannot consider the questions made relative thereto. In 25 *Ind.*, 510, such is declared to be the long, established practice.

In *Cochnowar v. Cochnowar*, 27 *Ind.*, 253, this rule of practice is recognized as a general one, but divorce cases are made an exception.

There is no hardship, and need be no loss of right in requiring a party to first apply to the *nisi prius* Court to correct errors, in such cases as this, and cases of default, &c., before resorting to an appellate court. *Skeen v. Huntington*, 25 *Ind.*, 510.

If the defendant sustained any injury in this case, it was caused by his own fault, and negligence.,

Judgment affirmed.

Dawson et al. v. Brouse et al.

IN GENERAL TERM, 1873.

THOMAS E. DAWSON ET AL. v. MARGARET C. BROUSE ET AL.

INJUNCTION—*will not lie, against public safety.*

Where a building has become unfit and unsafe for occupancy, by reason of fire, or inherent defects, making it dangerous in its condition, the fact of a tenant holding an unexpired term of a lease will not restrain the owner, by an injunction, from taking down the walls, and reconstructing the building, in such manner as he may deem best to secure safety, and permanency.

Byfield & Howe, for appellants.*Troxell*, for appellees.

BLAIR, J.—“This was an action for an injunction. The plaintiffs allege in their complaint that the defendants, Margaret C. Brouse, Annie B. Manlove, and Abbie L. Pearce, being the owners of certain real estate in the city of Indianapolis, upon which was situated a three-story brick building,” “and a one-story building a part of, and annexed to, and immediately south of said main building,”—did, on the 29th day of November, 1872, lease to the plaintiffs, by a written lease, rooms numbered, 87 and 89 of said building, being rooms “upon the ground floor of the main building, and also the one-story building aforesaid, together with the cellar-ways underneath, for the term of three years from the first day of December, 1872; that the plaintiffs are in the possession and occupancy of the same; that the defendants are about to tear

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the same down, demolish the building, and dispossess the plaintiffs, and are threatening, and making preparations for the same, &c.; wherefore they ask that the defendants may be enjoined from tearing the building down, or in any way disturbing the possession of the plaintiffs."

The defendants answered in two paragraphs, the first being a general denial. To the second paragraph a demurrer of the plaintiffs was overruled, and this ruling is assigned as error.

This paragraph contains much that does not add to its force or legal effect; much that must be regarded as mere surplusage. The substance of all the material allegations is that by reason of defects in the original construction of the building, of which defects the plaintiffs had no knowledge, the walls became insecure, the front, and rear walls bulging outward, breaking their connection with the partition walls, and the partition, and other walls, cracked to such an extent as greatly to impair the safety of the entire building, and afterwards, without the fault of the defendants, a fire broke out in the uppermost story of the main building, and destroyed the roof and its supports, and by reason of the fire, and the use of water in extinguishing it, the building was rendered less secure than it had previously been, rendering it incapable of being made secure by any repairs that could be made, hence the defendants contemplate tearing it down, and claim the right so to do, &c. The building is shown in other parts of the answer to have been erected in a business part of the city, to be occupied for business purposes.

It is objected in the first place that the answer does not meet that part of the complaint which includes the one story building in the rear, and hence only answers a part of the complaint.

The complaint says the rooms rented "include the ground floor of the main building, and the one-story building,"

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and, as they rented but two rooms, we infer from the complaint that they run back from the front to the rear of the one-story building, and the occupancy of either of the rooms in the main building, included the extension of the same rooms in the one-story building, and that taking down the walls of one rendered the other useless. The complaint does not show that the portion of the rooms in the one-story building can be used without those in the main building, but on the contrary leads us to infer that they cannot be so used. Under these circumstances they have no right to complain of the answer in the above respect.

When a building is located in a city, on a business street, and the building is to be occupied for business, and other purposes, and the walls have become insecure and dangerous from defects in the construction, or from the effects of fire, it is certainly right that the walls should be taken down. Safety to the public, safety to those persons who may frequent the building, and its vicinity require a reasonable care in this respect. The right to enforce the repair, or taking down of such walls, is one that may be exercised by municipal, or other public authorities, and is so manifestly for the interests, and safety of the public, that individual interests, and claims must yield to the claims of the public. If the walls have become insecure, and endanger the occupants of the building, or the passers-by upon the street, if they are so insecure that danger may reasonably be apprehended, it is the duty of the owners to make them secure, and their only assurance of immunity from probable loss, and damage by actions for injuries to the life, or property of others, in case of the walls or floors giving way, lies in acting promptly and efficiently in removing the danger.

We are, therefore, of opinion that the answer was sufficient.

Upon issues being joined upon the answer, the cause was

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tried, the Court, at the request of the plaintiffs, making a special finding of facts, and conclusions of law. Judgment was rendered refusing the injunction, and dismissing the complaint. The plaintiffs have appealed, and the next, and only remaining error assigned, is, error in the conclusions of law.

We do not deem it necessary to set out the entire finding of facts.

Those in reference to the condition of the building are substantially as follows :

The fire in the month of April, 1873, left the whole block unfit for occupancy, or business purposes; the roof was so injured as to afford but slight, if any, protection from rain, and the continued occupancy, or use of the rooms, was impracticable without a new roof.

“ That after said fire a part of the walls of said building, in consequence of originally defective construction, or as a result of said fire, or from both causes combined, were so cracked, and bulged as to be unsafe, and said building could not be sufficiently repaired by replacing the roof, and other parts of the wood-work injured by the fire. The south wall of the main building was, and is, badly cracked above the first story, and between that and the third story, and is one and three quarter inches out of line, or plumb. The east wall has a breach in the south, and in the second story ; the north wall is a little, but not much out of a vertical line ; the four brick partition walls, running north and south from bottom of the cellar to the floor of the third story are broken loose from the north and south walls above the first story, and give the latter no strength, or support, above said first story ; and the south cellar wall was poorly constructed, owing to defective mortar used in it, or from the mortar being frozen during the building of said wall ; but said cellar wall would support a new wall built upon it for a period longer than the continuance of plaintiffs' lease, but it is not

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strong enough to sustain a good upper wall as long as such a wall ought reasonably to stand."

Other findings show that the building could be repaired so as to be reasonably safe for a period longer than the residue of the term of the plaintiffs' lease, "by taking the south wall down to the top of the first story," and the south ends of all the partition walls, and rebuilding them properly, and by securing the north wall with iron anchor to the partition walls and to the joists, and putting on a new roof, and repairing the plastering; but with such repairs the building would not be "as good, nor as permanent or safe in character as a new building properly constructed would be. That such repairs would cost \$3500, or \$4000; and the annual rental value of the building prior to the fire, was three thousand six hundred dollars."

That the building is located on a part of Market street devoted to business, and that the present building has the public reputation of being unsafe, and it will be to the interests of the defendants to replace the building wholly by a new one, "because of the impracticability of making a permanently safe and substantial building out of the present structure. That it would be to the pecuniary interests of the plaintiffs to have it speedily repaired, that for other rooms of like dimensions, and suitable for their business, they would now have to pay an increased rent, but the damages they would sustain by being compelled to remove would not be irreparable, but might be compensated in damages, if their legal rights are violated by the acts of the defendants in demolishing the present structure."

These findings fully sustain all the material allegations of the answer. Indeed, they make a stronger case for the defendants, than the allegations of the answer. They show the condition of the building to be such that for the time being it is unfit for occupancy; that in no event can it be

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made reasonably safe, without taking down the entire rear wall to the top of the first story, and the south end of the partition walls down to the same level, and rebuilding the same. Even with these repairs, and others which are also found to be necessary, the building would only be reasonably secure for a period longer than the remaining term of the plaintiffs, and not as long as such a building ought reasonably to stand, and that a permanently safe, and substantial building cannot be made out of the present structure. To make the repairs would necessarily occupy almost as much time as to take the walls down, and rebuild. At most, the difference in time could not seriously affect the rights of the plaintiffs, and during such time, if either course is pursued, the rooms are unfit for occupancy. If the position assumed by the plaintiffs is correct, the defendants will be compelled to repair the building as best they can, still leaving it with inherent defects, that in a few years at most, would render it again unsafe. During this period the defendants would have full knowledge of these inherent defects, and that it was only "reasonably safe," and that this moderate degree of safety, would only last for an uncertain time, and might terminate in a disastrous fall of the building, or some portions of it, when least expected.

This would be compelling the defendants to assume an unreasonable risk in maintaining a structure which they know to have defects rendering its safety to the occupants and the public, very questionable. Under these circumstances, we believe the defendants should not be prevented from reconstructing the building, so that permanent safety can be secured.

It is true that the term of the plaintiffs' lease has not expired, and they yet have possession, but that they should persist in remaining in a building whose walls are manifestly unsafe, both to themselves, and the public, so as to prevent the owners from making it safe, is unreasonable.

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The decision of this cause settles nothing as to the covenants, or conditions of the lease, held by the plaintiffs.

We simply hold that the building, having become unfit and unsafe to be occupied, the Court will not, on the application of a tenant holding an unexpired term of a lease, restrain the landlord by an injunction, from taking down the walls, and reconstructing the building in such manner as he may deem best to secure safety, and permanency.

No fact is alleged in the complaint, or found to exist, indicating that the plaintiffs will suffer irreparable damage by the threatened action of the defendants. On the contrary, it is found that they can be compensated, and that before the suit was commenced, they offered to accept a sum of money as compensation. On this ground alone; the conclusions of law would be well and fully sustained.

Judgment affirmed.

IN GENERAL TERM, 1873.

JOHN JORDAN v. CHARLES HELWIG ET AL., Appellants.

NUISANCE—*liability for*—
COMMON COUNCIL.

The Common Council cannot, by granting a building permit, thereby authorize the erection of a building, to the injury of person, or property.

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One who erects a nuisance is liable for its continuance, as for a new nuisance, as long as it continues, and it is not in his power to release himself therefrom by granting it over to another.

So where one, who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief.

One, who erects a nuisance, and afterwards parts with the real estate upon which it is located, either by conveyance with a warranty or covenant, that amounts to an affirmation of the nuisance, and a grant of its continuance; or leases it on terms by which he derives a benefit, or profit from its continuance, or leases his real estate, receiving rent therefor, and knowing, or having reason to believe, that the use of the property for the purpose for which it is leased will prove to be injurious to the property of others, or become a nuisance, will be liable to an action for an injury resulting therefrom.

Where the evidence shows the use for which a lumber kiln was erected, the use that had been made of it, and that the lessees thereof were intending to, and did continue to use it in the same way, and for the same purposes as formerly used by the lessor, the jury may reasonably infer that the lessor knew, or had reason to believe that the lessees would continue the use of it in the same place, and that such was their object in leasing the premises, and that if the use of the kiln, at that place, was inherently dangerous, they might find against the lessor, for he could not relieve himself from liability by leasing the real estate, and not making any agreement, covenant, or guaranty to uphold them in the use of the kiln.

Harvey—Porter, Harrison & Hines, for appellant.

Taylor, Rand & Taylor, for appellee.

BLAIR, J.—The plaintiff, in his amended complaint, alleges that he is the owner of certain lots in the city of Indianapolis, having certain buildings thereon, and that the defendant is the owner of certain other lots immediately adjoining those of the plaintiff, and separated therefrom only by an alley fifteen feet wide; that the defendant, Helwig, over the protest of the plaintiff erected thereon, about the 24th day of May, 1869, a wooden tenement, or building commonly called a dry kiln, to be used for drying and seasoning lumber, with a furnace therein, wherein to burn fuel,

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heat the building, and dry lumber, Helwig knowing its dangerous character, and its liability, because of the quality of the material of which it was built, and the manner of its construction, and use ; to take fire, and burn up, and thus destroy the buildings of the plaintiff ; that Helwig for a time used and operated the same for the purpose of drying lumber, and then leased the same to his co-defendant, to be used for the same purpose and in the same manner, well knowing the danger of using the same, and how liable the use of the same was, to result in injury to the plaintiff ; that his co-defendant took possession of and used the premises, and the use, and operation of such building as a kiln for seasoning and drying lumber at the place where located rendered it a nuisance, and dangerous to the plaintiff, and that on the 27th day of July, 1870, it took fire, and was destroyed, and the flames, and sparks therefrom fired the plaintiff's buildings, and caused them to burn ; wherefore, the plaintiff seeks to recover, &c.

The defendant answered in five paragraphs :

The first was a general denial.

The second paragraph was that the building was erected in pursuance of a permit from the Common Council of the city of Indianapolis ; that it was erected in a skillful, and workmanlike manner, for the purpose it was intended for ; that while he had any connection therewith it was conducted and carried on in a careful, and lawful manner ; that in October, 1870, long before the injury complained of accrued, he sold all his right in the building to Jackson & Rider, from whom it passed to his co-defendant, the Indianapolis Chair Company, and afterward, in May, 1870, he leased the ground to the Chair Company, since which he has had no interest in the building, its management, nor the work carried on therein, nor control over the same in any way.

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The third paragraph omits the averments in regard to the permit, but otherwise is substantially the same as the second.

The fourth paragraph avers that the plaintiff well knew the premises, and the trade, and the business to be carried on therein, and with such knowledge allowed the same to be erected, and concludes with the same averments as to the transfer of property.

The fifth paragraph is that the defendant, Helwig, long before the burning complained of, ceased to have any interest in the premises, and that the fire complained of did not originate in said building, but was caused by the negligence and carelessness of the plaintiff and his employees, whilst at work on the plaintiff's premises.

Demurrers were sustained to each paragraph of answer, except the first. These rulings are assigned as errors.

The City Council could not, by granting a permit, have authorized the defendant, Helwig, to erect a building so as to injure the plaintiff, or his property. The building permit would not authorize the erection of a nuisance. Hence that portion of the first paragraph, alleging that the building was erected in pursuance of a permit, may be regarded as surplusage, and adds nothing to the force of the other allegations in the paragraph. The third paragraph is substantially the same as the second; it contains no facts save those that might be proved under the second.

The averments of the fourth paragraph, that the plaintiff knowing the premises, and the business to be carried on in the building, allowed it to be erected, constitute no defense. He was not obliged to resort to an application for an injunction, or failing to do so, lose his right of action, if damages ensued from the act of the defendant.

The fifth paragraph contains no facts, except such as might be proved under the general issue.

The second paragraph sets up facts showing that prior to,

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and at time of the fire, the defendant, Helwig, had parted with his property in the kiln, and afterwards leased the real estate upon which it was erected. If the demurrer was well taken to this paragraph, there was no error in sustaining it to the 3d, 4th, and 5th; and if the second paragraph was good, there would be no error for which we could reverse the case, on account of the demurrers having been sustained to the other paragraphs; for the same evidence might be introduced in support of the second, that would have been admissible under either of the others.

The cause was tried, resulting in a verdict against the defendant, Helwig, from which he appeals. There is no dispute as to the material facts in the case, and the errors assigned upon the rulings on demurrers, and for giving, and refusing instructions, all raise but one and the same question

The buildings of the plaintiff were located as stated in his complaint. Immediately across the alley, fifteen feet wide, the kiln was constructed. It was erected on the real estate of Helwig, and was originally built by himself, and one Jackson, and one Rider, who were at the time partners in the business of manufacturing furniture, and was built for the use of the partnership for manufacturing purposes, and belonged to the firm; other parts of the same lots on which the kiln stood, were used as a lumber yard by the firm. The kiln was built in May, 1869. In September, 1869, the partnership was dissolved, and Jackson & Rider continued to carry on the business, and became the owners of the kiln by the terms of the dissolution, and Helwig leased them the lots on which the kiln was located, for a term of three years, reserving rent therefor. The lease merely describes the real estate, and adds, "together with the rights, privileges, and appertenances thereunto belonging, to have, and to hold the same, for and during the term of three years," &c.

The premises, including the kiln, were in the possession of,

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and used by Jackson & Rider at the time of the fire. Helwig, at the time he sold his interest in the partnership property, including his interest in the kiln, leased the real estate on which the kiln stood, to Jackson & Rider.

The property in the kiln passed, by the terms of the dissolution of partnership, and the division of the partnership property, to Jackson & Rider, as other personal property of the firm passed, and not as real estate, or an interest in real estate. The mere structure itself was not a nuisance, nor is it claimed to be such by the complaint.

It is alleged that the use and operation of it as a kiln for seasoning and drying lumber, at the place where it was located, rendered it dangerous to the property of the plaintiff. Without fire in it, without its use for the purpose for which it was erected, it was harmless. It was used for the purpose for which it was erected, for some fourteen months without harm to the plaintiff. From May, 1869, to September 21st, 1869, the defendant, Helwig, had an interest in the kiln, and as a partner, derived profit from its use. After the 21st day of September, 1869, until the time of the fire on the 27th of July, 1870, a period of over ten months, it was used for the same purpose by Jackson & Rider, or their assignee, the Chair Company, without any injury resulting to the plaintiff.

After the defendant, Helwig, had parted with his interest in it, according to the terms of the dissolution of the partnership, and his lease of the real estate on which it stood, was he liable for damages resulting to the plaintiff? This is the real question in the case.

It is a general rule that one who creates a nuisance, is liable for its continuance, as for a new nuisance, as long as it is continued, and it is not in his power to release himself therefrom by granting it over to another.

The first case cited in support of the claim of the plaintiff,

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is that of *Roswell v. Prior*, 12 *Mod.*, 635; also, reported in 1 *Lord Raymond*, 713, and 2 *Salk.*, 460. This was an action for the obstruction of ancient lights. The lights were obstructed by the erection of a building adjacent to that of the plaintiff. The defendant, after the erection of the building, had leased the same, reserving rent therefor; and on the ground that he had thereby agreed that the obstruction should continue, he was held liable.

The next is that of *Rich v. Basterfield*, 56 *Eng. Com. Law*, 783. This was an action arising from smoke and noxious gasses, emanating from low buildings, and chimneys attached thereto, and entering the dwelling of the plaintiff. The buildings erected by the defendant were let as shops, for what purpose is not disclosed, but the smoke passed into the house of the plaintiff. The defendant had leased the shops from week to week, and they were in possession of the tenant at the time of the injury complained of. It was shown that the premises had been used without injury to the plaintiff by a former tenant, and as the injury resulted from the use of the premises by the tenant occupying the shops, the landlord only being chargeable with having erected them, and by leasing them, enabled the tenant to make fires if he chose, but the landlord not being under any obligation to uphold the tenant in the use of the premises as he did use them, he was held not liable. The premises were capable of being used without injury to any one, and there is nothing in the case as reported to show that the landlord had any knowledge, or reason to believe, that they would be used so as to become a nuisance.

The Court says, "the utmost that can be imputed to the defendant, is, that he enabled the tenant to make fires if he pleased," and in commenting upon the case of the *King v. Pedley*, 1 *Ad. & E.*, 822, the Court says, "if it is to be taken as a decision that the landlord is responsible for the act of

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his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it."

In the case of *Fish v. Dodge*, 4 Denio, 311, the plaintiff occupied a dwelling-house, and kept boarders. The defendant owned a blacksmith shop adjoining, and rented a part of it to be used in finishing steam boilers, and the use of it for that purpose disturbed the plaintiff and her boarders. There was no partition in the shop, and the defendant also carried on his business in the shop at the same time, his workmen, and those making boilers working part of the time at the same forge, and the defendant all the time carrying the key, and controlling the shop. After commenting upon certain cases, and announcing the general rule to be, as already stated, the Court used the following language: "But none of the cases go far enough to aid the plaintiff, unless the defendant can be regarded as the author of the nuisance. He did not manufacture the engine boilers, nor were they made for him. But the jury have found that he let the shop for the purpose of having the boilers manufactured there; and if he knew that it would prove a nuisance to the plaintiff, I think the action may be sustained." One who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief. It was, therefore, held in that case, that the defendant was not liable, unless he knew, or had reason to believe, that he was letting the shop for a use which must prove injurious to the plaintiff.

The case of *Wagoner v. Jermaine*, 3 Denio, 306, was an action on the case for overflowing lands of the plaintiff. The dam which caused the overflow, was erected long before the action was brought, but was raised by the defendant some four years prior to the bringing of the action, and after it

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was raised, the premises on which it was located were conveyed by the defendant; the conveyance contains covenants of seizin and warranty, and also a clause giving the grantees the right to flow the lands of the grantor "to high water mark, and as far as has hitherto been necessary for the use of the mills on the premises above conveyed, the dam remaining at its present height."

It was held that the action could be maintained, because the covenants in the deed made by the defendant were an affirmance of the nuisance in possession of the grantee. Before that, the case of *Blunt v. Aiken*, 15 *Wend.*, 522, had been decided, in which it was held (it also being an action for overflowing lands by a mill dam) that an action on the case for flowing lands will not lie against a former owner of land who erected the dam and built a mill, by means of which the injury was done, where it appears that other persons are in possession of the premises, occupying them as their own, and there is no evidence that they hold as tenants of such former owner. The action must be against the person in possession.

In the case of *Wagoner v. Jermaine*, the Court in commenting upon the case of *Blunt v. Aiken*, uses the following language: "The principle, however, is recognized, and sanctioned by the reasoning in that case, that where the defendant is out of possession at the time the injury was committed, and another person has the entire possession, if he was the erector of the nuisance and owner of the premises, and under some agreement with the possessor by which he was bound to uphold him in possession, the action would well lie against him, on the ground that he, by such relation with the occupier, had affirmed the continuance of the nuisance, that it might be said to be a continuance by himself."

It will be seen from an examination of the foregoing cases, that the principle upon which an action is maintained against

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one who erects a nuisance, but who has afterwards parted with the real estate on which it is located, is that he has conveyed it with a warranty, or covenant, that amounts to an affirmance of the nuisance, and a grant of its continuance, or has leased it on terms by which he derives a benefit, or profit, from its continuance ; or leases his real estate, receiving rent therefor, and knowing, or having reason to believe, that the use of the property for the purpose for which it is leased, will prove to be injurious to the property of others, or become a nuisance.

The case of *Hanse v. Cowing*, 1 *Lansing*, 288, is cited by the defendant. This was also a case for the flowing of water caused by a dam, or embankment. Evidence was introduced showing, that the premises had been conveyed by the defendant, who had erected the dam, or embankment, and it was held competent for the purpose of showing that he was not liable for a continuance of the nuisance. The following language is used by the Court on this point. "The general proposition is undoubted, that one who creates a nuisance is liable for its continuance, as for a new nuisance, so long as it continues, but the proposition is not unqualifiedly true. To remain liable, he must in fact own, or possess the premises on which the nuisance is created, or must derive some benefit from its continuance." It is said, further, that "the deed, to bind the party who erects the nuisance should warrant the continued enjoyment of the nuisance itself, or what creates the nuisance as used at that time."

In the case at bar, the kiln was not a part of the real estate, it was erected for manufacturing purposes, and was never owned by Mr. Helwig, except as a member of a partnership. Before the injury occurred, he parted with his entire interest in it; he owned the real estate on which it was erected, and leased it to his former partners, who were then the owners of the kiln. There is nothing in the lease, in evidence, that

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binds Helwig to maintain them in the use of the kiln, nor can it be said that he, after parting with his property in it, derived any benefit from its use, except as he received the rent stipulated for the use of his real estate.

If the use of the kiln, at the place where it was located, was as alleged in the complaint, inherently dangerous to the property of the plaintiff, and the defendant with such knowledge sold his property in the kiln to Jackson & Rider, his former partners, and leased them the real estate, reserving rent therefor, knowing, or having reason to believe, that they would continue to use the premises as a location for the kiln, and knowing, or having reason to believe, that they would continue the use of the kiln for the purpose for which it was erected, and as it had been used before, the case is within the rule laid down in numerous cases, and particularly that of *Fish v. Dodge, supra*, and the defendant would, in such case, be liable.

The second paragraph of the answer does not (nor do any of the other paragraphs) negative these averments of the complaint, or avoid them. The lease of the real estate by Helwig, was introduced in evidence, and also testimony as to the sale of his interest in the kiln to Jackson & Rider; and, in fact, there does not seem to have been any evidence that would have been admissible under the second paragraph of answer, excluded from the consideration of the jury. The first, second, and third instructions, given by the Court, to the giving of which the defendant excepted, are in harmony with the rules of law as before stated, and are unobjectionable.

The fourth, fifth, sixth, and seventh instructions, asked by the defendant, and refused by the Court, and to which refusal the defendant excepted, ignored the rule as we have given it, and sought to release the defendant from liability, on the ground of his having parted with his property in the kiln,

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and leased the premises without any covenant or guaranty, to uphold the lessees in the continued use of the same. If he knew the kiln was inherently dangerous, and knew, or had reason to believe, that the lessees would continue the use of it in the same place, he could not relieve himself from liability by leasing the real estate, and not making any agreement, covenant, or guaranty, to uphold them in the use of the kiln.

The instructions given, fairly submitted these questions to the jury, and as the evidence showed the use for which the kiln was erected, the use that had been made of it, and that the lessees were intending to, and did continue the same use, the jury might reasonably infer that Helwig knew, or had reason to believe, that the lessees would continue the use of it in the same place, and that such was their object in leasing the premises; and if the use of the kiln at that place was inherently dangerous, they might find for the plaintiff; and as they did so find in accordance with the instructions, we cannot disturb the verdict.

We discover no error in refusing the instructions asked.
Judgment affirmed.

Munson v. Meiners.

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DAVID MUNSON v. CORNELIUS MEINERS.

CONTRACT—*by wife.*

A contract entered into by the wife, for work, and material to be furnished, unauthorized by the husband, will be held to be ratified by him, if, with a full knowledge of all the facts, he gives no notice of disapproval, or otherwise seeks to absolve himself from liability within a reasonable time, by repudiating such act done without his authority.

NEWCOMB, J.—The plaintiff is a manufacturer and vender of lightning rods, and one Gardner was, in May last, his traveling agent for the sale of the same.

This suit was brought to recover the value of a liberal quantity of lightning rods, with which the defendant's residence was embellished by Gardner. His professional adroitness in the transaction is detailed by Gardner, in a manner so bland and artless, that we cannot improve his statement by condensation, and therefore copy his testimony in full from the bill of exceptions.

He says: "I was working for the plaintiff in May last, putting up lightning rods. While passing the house of defendant, his wife called me in, and told me to fix the lightning rod on the house, that it was broken. I examined the old rods, and told her that they could not be fixed, but that I could put on new ones. She asked me what it would cost. *I told her I did not know.* She said fix it right and safe. I

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then put on 200 feet of new rods. *It was worth \$75.* Do not know Mr. Meiner's—never saw him."

Cross-examination.—"Can't tell how much old rod there was. I put the new *all over the house, and back on the sheds.* There were only two points to the old rod—there were five points to the new. She asked me how much it would cost, but I did not even intimate whether it would cost \$5 or \$100. Gave her no idea what it would cost. I don't know what I did with the old rod; we generally take them away; they are not worth anything."

The defendant testified that his wife had been an invalid for years, and that she was not, and had not been, his agent for the transaction of any business whatever; that he was absent when the lightning rods were put up, and that on his return, about three weeks afterward, he was displeased because they were there, and so told his wife; that she said they would not tell her what it would cost, and that she had \$10 in the house out of which she expected to pay the bill; that if she had known it would cost more, she would not have had the work done. The defendant further testified that he never interfered with the rods; that he did not notify Munson that he was dissatisfied with the act of his wife, or have any communication with him touching the lightning rods.

There can be no doubt, from the testimony of Gardner himself, that he purposely concealed from the defendant's wife the cost of putting up the new rods, by the false statement that he did not know what they would cost; and that he used a much larger quantity of material than was on the building before, and larger than he was authorized to by the order he received; but under the facts as they appear in the bill of exceptions, we cannot relieve the defendant from the judgment rendered against him at Special Term. He might have absolved himself from liability by repudiating the unau-

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thorized act of his wife, and notifying the plaintiff to remove the rods. Instead of doing this, he remained silent for more than two months after all the facts in the case came to his knowledge, although both he, and the plaintiff resided in this city; and there is no evidence that he gave any notice of dissatisfaction until after he was sued for the value of the lightning rods.

The defendant must, therefore, be held to have ratified what his wife had done without his authority, and also the acts of Gardner in excess of the wife's order; consequently the motion for a new trial was properly overruled.

On the trial the plaintiff was permitted by the Court to amend his complaint by striking out the words, "his special instance and request," and inserting the words, "the request of defendant's wife, and that the defendant ratified and affirmed the same," so that instead of averring a request from the defendant himself to furnish the rods, the complaint charged a request by defendant's wife and a ratification of her act by him. To this amendment the defendant excepted, and assigns its allowance as error. In legal effect there was no essential difference in the averments. The complaint was neither better nor worse for the amendment, and no injury accrued to the defendant in consequence of it.

The judgment at Special Term is affirmed, at the cost of the appellant.

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IN SPECIAL TERM, 1873.

GEORGE BRUCE V. MARGARET M. BAKER ET AL.

WILL—*interpretation of*—

DESCENT—*laws of*—

KINDRED—*degrees of, how computed.*

Where two provisions in a will are inconsistent with each other, and cannot stand together, the rule that the latter provision must prevail, is only to be applied where there is an invincible repugnancy, and it is impossible to determine which clause the testator intended to prevail.

In arriving at the intention of the testator, the entire will is to be examined, and if necessary, words and sentences may be transposed, or even supplied, to make it read as evidently intended, and as near as can be, effect given to the whole instrument.

A general disposition, by will, of an estate, will be regarded as subject to a more specific disposition, and it is not important in applying this rule, whether the general, or more specific provision comes first in order.

A will should not be construed so as to disinherit an heir, unless the intent to do so is clearly expressed.

The Statute of this State regulating descents and the apportionment of estates, covers the entire law of descent, and the common law canons of descent are not in force.

Where an intestate leaves him surviving, no widow, no child or children, or descendant of such child or children, no father or mother, no brother or sister, and no descendant of any brother or sister, no grandfather or grandmother, no uncle or aunt in the paternal line, or descendant of any such uncle or aunt, the estate will go to the next of kin.

In ascertaining who are next of kin in such case, we are not limited in the line of lineal ascent to that of grandfather and grandmother, but the estate must go to the next of kin, though such kin is found in the line of lineal ascent further removed in degree of kindred than grandfather or grandmother.

It is not contemplated by the Statute of descents and the apportionment of estates that two different rules should be followed in computing degrees of kindred, one to be applied in cases of descent of real estate, and the other in the distribution of personal estate.

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Degrees of kindred under the Statute of descents and apportionment of estates, are to be computed by the rule of the civil law.

The great-grandmother of an intestate, by the rule of the civil law, is one degree nearer of kin to the intestate, than a great-uncle or great-aunt.

The principle of representation as given in the second section of the Statute of descents, is not applicable to that part of the fifth section of the Statute which provides that in the absence of any of the kindred named in that, and the preceding sections, the estate "shall go to the next of kin in equal degree of consanguinity." By this latter provision the estate goes to the next of kin who are living at the death of the intestate.

Baker, Hord & Hendricks, for plaintiff.

R. B. & J. S. Duncan, for Margaret M. Baker.

Ritter, Walker & Ritter, and Chapman, Hammond & Hawes, for other defendants.

BLAIR, J.—The plaintiff in his complaint, claims to be the owner in fee simple of the undivided seven-eighths, and admits that the defendant, Margaret M. Baker, is the owner of the undivided one-eighth of certain tracts of land in Marion county. For more particular reference, one of the tracts is designated as tract No. 1, and the other as tract No. 2. William Reagan owned tract No. 1, and died testate, on the 5th day April, 1847. By his will, which is made a part of the complaint, it is claimed that the said tract passed to his widow, Nancy Reagan, during her natural life, remainder to his daughter, Rachel Johnson, then the wife of Jeremiah Johnson, during her natural life, and after her death to her child or children of her body, lawfully begotten, who might survive her, in fee simple. The will, which was duly probated, reads as follows :

"I, William Reagan, of Marion county and State of Indiana, knowing the uncertainty of life, but being of sound mind and discretion, do make and publish this, my last will and testament, hereby revoking all former by me made. I do bequeath unto my daughter, Rachel Johnson, wife of Jeremiah Johnson, a tract of land on which she now lives,

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lying and being in Marion county, known as the south half of the south-east quarter of section number twenty-five in township number sixteen north of range three east, for and during her natural life, provided she shall be living at the time of my death, and after her death to the child or children of her body lawfully begotten who may survive her, in fee simple. But if she, said Rachel, should die before me and leave such child or children living at my death, then, in that event, I bequeath said land to said child or children in fee simple. But should she, said Rachel, be living at the time of my death and afterwards die leaving no such child or children, then I give and bequeath said tract of land to said Rachel for life. Remainder to my right heirs in fee simple.

I give and bequeath to my daughter, Dovey Bruce, wife of George Bruce, the north half of the aforesaid tract of land for and during her natural life, provided she shall be living at the time of my death, and after her death to the child or children of her body lawfully begotten who may survive her in fee simple. But if the said Dovey should die before me and leave such a child or children living at my death, then, and in that event, I bequeath said tract of land to said child or children in fee simple. But should the said Dovey be living at the time of my death and afterwards die, leaving no such child or children, then I give and bequeath said tract of land to said Dovey for life. Remainder to my right heirs in fee simple.

It being my express intention that my said daughters shall respectively enjoy said tracts of land above described and bequeathed during their respective natural lives, and after their and each of their deaths to descend in fee simple respectively to the child or children of their bodies lawfully begotten that may survive them respectively and survive myself, and in default then to go to my right heirs in fee simple.

I give and bequeath to my beloved wife Nancy during her natural life, the farm on which I now live, known as the

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south-east quarter of section number twenty-five in township number *sixteen* (16) north of range three east, and after her death to my right heirs in fee simple, except the said Rachel Johnson and Dovey Bruce, and their descendants.

I also direct that all my just debts, expenses of my last sickness, and funeral expenses, shall be paid out of the money and personal property I may die possessed of, and the rest and residue thereof I give and bequeath to my said wife Nancy, and after her death to my said daughter, Dovey Bruce.

In witness whereof, I have hereunto set my hand and seal this 11th day of November, 1842.

[L. s.]

WILLIAM REAGAN.

Signed, sealed, and published in presence of us who have signed as witnesses in presence of each other. Phillip Sweetzer, John W. Hamilton, John Sutherland, George W. Stipp."

The complaint then shows that at the death of William Reagan, he left him surviving, his wife Nancy Reagan and his two daughters Rachel Johnson, then the wife of Jeremiah Johnson, and Dovey Bruce, then and still the wife of the plaintiff, George Bruce, and leaving no other child, or descendant of any other child surviving him. That Dovey Bruce had, at the making of the will, and at the death of said testator, two sons living, and that Rachel Johnson had one son, Harris L. Johnson, then living. That Rachel Johnson died on the 24th day of April, 1847, leaving her husband, Jeremiah Johnson, and her son Harrison L. Johnson, her surviving. That at the death of the said Rachel Johnson, the fee simple in and to tract No. 1, vested in Harrison L. Johnson, subject to the life estate of Nancy Reagan.

As to tract No. 2, it is alleged to have been purchased of the government of the United States, by Jeremiah Johnson in 1821, and afterwards conveyed to his son, Harrison L.

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Johnson, for a valuable consideration. That Harrison L. Johnson, married Margaret Peck, by whom he had one child, John W. Johnson. That Harrison L. Johnson died intestate, on the 15th day of September, 1856, leaving his widow, Margaret Peck Johnson, and his son John W. Johnson, surviving him, each of whom received by descent an undivided one-half of both of said tracts.

That Jeremiah Johnson, (grandfather of John W. Johnson,) died on the 5th day of April, 1857. That Margaret Peck Johnson, widow of said Harrison L. Johnson, died on the 5th day of December, 1857, leaving her son, John W. Johnson, her sole heir. That the said John W. Johnson, being thus the owner of one half of both tracts of land by descent from his father; and the other half by direct descent from his mother, died intestate on the 27th day of December, 1872, leaving surviving him no widow, no child or children, no father, no mother, no brother or sister, and no descendant or descendants of any such brother or sister, no grandfather or grandmother, no uncle or aunt in the paternal line, and no descendant or descendants of any such uncle or aunt in said paternal line, but leaving him surviving his great-grandmother, the said Nancy Reagan, who was the grandmother of his father," she being his *next of kin among his paternal kindred*, and to whom it is alleged the undivided one-half of the two tracts of land descended or rather ascended, and that she has since conveyed the same to the plaintiff. The other half of said two tracts, it is admitted in the complaint, passed to the maternal kindred of John W. Johnson, all of whom have conveyed to the plaintiff except the defendant, Margaret M. Baker, who owns one-eighth as before stated.

The complaint alleges that the defendants, other than Margaret M. Baker, claim some interest in the real estate, and the plaintiff asks that his title may be quieted; and a second paragraph asks that partition be made, etc.

The defendants, Rouel Reagan and others, one of whom is a brother of William Reagan, and others who are descendants of other brothers and sisters of William Reagan, by their answer claim an interest in tract number one, by virtue of the will of William Reagan.

A demurrer having been filed to their answer, the following opinion was rendered thereon :

It is not disputed but that by the first clause of the will ; if it is to stand and be construed as it reads, the tract in question would pass as follows : To Rachel Johnson, daughter of the testator, for her natural life, and after her death to her son, Harrison L. Johnson, in fee simple.

The claim of these defendants is based upon the last clause of the will, they claiming to be right heirs of William Reagan, the testator. This clause, as far as it relates to the claim of the defendants, Reagan and others, is as follows : " I give and bequeath to my beloved wife, Nancy, during her natural life (here tract No. 1 is described), and after her decease to my right heirs in fee simple, except the said Rachel Johnson and Dovey Bruce and their descendants.

Taking each of these provisions of the will we have :

1st. The same real estate bequeathed to Rachel Johnson for life and Nancy Reagan for life ;

2d. That after the death of Rachel Johnson it is bequeathed in fee simple to her son, Harrison L. Johnson ;

3d. After the death of Nancy Reagan it is bequeathed in fee simple to the right heirs of William Reagan, the testator, "except the said Rachel Johnson and Dovey Bruce, and their descendants.

As to the two co-existent life estates which are carved out of the fee, we have but little difficulty. One of the first rules for disposing of such cases, is, that both take jointly, or as tenants in common—but whether we dispose of the apparent difficulty in that way, or by holding the latter life

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estate to prevail over the first, is unimportant in this case. Whatever estate Rachel Johnson took, ended at her death, which occurred only nineteen days after that of her father. The disposition made of the fee presents greater difficulty. The entire scope and scheme of the will, except the latter clause, contemplates and shows, an intention on the part of the testator, to devise the estate in fee to the child or children of Rachel Johnson, if any such survived her, and only in case such child should not survive her, was it to go to his heirs.

The first part of the will, is clear and explicit; and makes a specific disposition of the fee simple of the real estate to parties competent to take, and to such as we would naturally infer he wished to give it—that is; to his daughter for life, and to his grand son in fee. In addition to this, he says such is his express intention.

It is urged that the two provisions can not stand together, and hence the latter must prevail. This is a rule which is generally announced, and yet seldom applied, and less frequently now than formerly.

There is but little reason to support it. The last solemn act in making a will, is signing and publishing it, and this act relates to all and every part of the instrument, and gives force and validity to the instrument as a whole.

The rule, at best, is but an arbitrary one, and only to be used where there is an invincible repugnancy, and it is impossible to determine which clause the testator did intend to have prevail. In arriving at the intention, the entire instrument is to be examined, sentences and whole clauses transposed, if necessary, and even words and sentences supplied, to make it read as evidently intended. As near as can be, effect must be given to the whole instrument.

A search among precedents will aid us but little.

As before stated, the will under consideration in its first

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provisions is clear and specific. The person, or persons, who take in fee, certain definite parts of the real estate, are pointed out as the "child or children" of his daughters, lawfully begotten. The last clause, if the construction claimed by the defendants is to prevail, is a general bequest of the fee to his "right heirs," except to his daughters and their descendants. This construction would violate one fundamental rule, that a general disposition of the estate, will be regarded as made subject to the more specific. It is not important in applying this rule, whether the general, or more specific provision, comes first in order.

The construction claimed on behalf of the defendants, abrogates the entire will, except the last clause, and disinherits his own children; thus violating another rule, that wills should not be so construed as to disinherit an heir, unless the intent to do so is clearly expressed.

Immediately preceding the last clause, the testator says, it is his express intention, that all of his real estate, shall go to the child or children of his daughters, and only in default thereof, should go to his right heirs.

To give the will any other construction, than that which is consistent with the testator's declared intention, would make the last clause repugnant to the specific directions, as well as to the general scheme of the will, and compel us to believe that the testator had a capricious and irrational intention. If it was necessary, I should have no hesitancy in holding, that some words are omitted from the last clause, which it is clear were intended to have been used, to make it express the intention of the testator.

But even as it is, I am of opinion, that it is not susceptible of the construction claimed by the defendants.

The demurrer must, therefore, be sustained.

The defendants, Mary Cloud and others, having also filed their answer, and the plaintiff having demurred to the same,

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upon the question thus raised, the following opinion was rendered :

The defendants, Mary Cloud, Milton Johnson and Nancy Harding, living sisters and brother of Jeremiah Johnson, the grandfather of John W. Johnson, and the other defendants who are descendants of other brothers and sisters of Jeremiah Johnson, claim to have inherited a portion of the real estate.

Their claim is based upon three positions.

1st. That our statute does not permit lineal ascent above that of grandfather and grandmother, or the survivor of them, and as the first canon of the common law did not permit lineal ascent in any case, and the common law canons of descent being in force except as changed or repealed, by our statute, the one-half of the real estate descended to the collateral relatives of the blood of the father of John W. Johnson ; they being next of kin in equal degree of consanguinity.

The position is untenable. Our statute was intended to, and does cover the entire law of descents ; and in the language of the court in *Murphy v. Johnson*, 35 Ind., 442, "the common law canons of descent have been overturned in this State by our statute of descents."

Such has been the ruling in most, if not all, of the States of the United States, where statutes of descent have been adopted similar to ours. *Penn v. Cox*, (10 Ohio Rep., 32.)

The rights of the defendants must therefore stand, or fall, by the construction to be placed upon our statute of descents.

The first section of the statute (1 G. & H. p. 291,) provides for descent to children.

The second section, to grand children, and as it will hereafter be referred to more particularly, I cite it in full.

"SEC. 2. If any children of such intestate shall have died intestate, leaving a child or children, such child or children shall inherit the share which would have descended to the

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father or mother, and grand children, and more remote descendants, and all other relatives of the intestate, whether lineal or collateral, shall inherit by the same rule : *Provided*, 'That if the intestate shall have left at his death grandchildren only alive, they shall inherit equally."

The third section provides that in the absence of children or their descendants, the estate shall go to the father and mother, and to brothers and sisters, *and their descendants*.

The fourth section, in the absence of brothers and sisters or their descendants, gives all the estate to the father and mother.

The defendants are not within any of these clauses.

The fifth section, as far as applicable to this case, reads as follows :

"SEC. 5. If there be no person entitled to take the inheritance according to the preceding rules, it shall descend in the following order : *First*. If the inheritance came to the intestate by gift, devise, or descent, from the paternal line, it shall go to the paternal grand-grandfather and grandmother, as joint tenants, and to the survivor of them ; if neither of them be living, it shall go to the uncles and aunts in the paternal line, and their descendants, if any of them be dead, and if no such relatives be living, it shall go to the next of kin in equal degree of consanguinity, among the paternal kindred ; and if there be none of the paternal kindred entitled to take the inheritance as above prescribed, it shall go to the maternal kindred in the same order."

There being no grandfather or grandmother ; no uncles or aunts of the intestate, or the descendants of any such, the real estate in question must "go to the next of kin in equal degree of consanguinity," and in ascertaining who are next of kin, we are not limited as claimed by the defendants, in the line of lineal ascent, to that of grandfather and grandmother, but if the *nearest of kin*, is found in the line of

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ascent, further removed in degree of kindred than grandfather or grandmother, it is there, the estate must go.

The statute is silent as to the rule, by which degrees of kindred are to be determined.

This leads to the second and most important question presented. The plaintiff's title is based upon the descent of the real estate to Nancy Reagan, the great-grandmother of the intestate, as his next of kin. By either rule of computing degrees of consanguinity; by the rule of the civilians, as well as by the rule of the canonists, she stands in the third degree. The defendants, who are brothers and sisters of Jeremiah Johnson, the grandfather of the intestate, (being great-uncles and great-aunts of the intestate,) by the rule of the civilians, would be in the fourth degree; and by the rule of the canonists, in the third degree, that is, in the same degree of kindred to the intestate, as Nancy Reagan.

In reckoning degrees of consanguinity, the common law recognizes two methods, the rules of the canon law being applied to the law of the descent of real estate, and the rule of the civilians being followed in the descent of personal estate, and each of which rules, it is said by common law writers, has been adopted by the common law.

A search for the origin of these rules leaves us in a maze of uncertainty, except in this; that the English statute of descents, and the rules of computing degrees of kindred according to the canonists, is the growth of the feudal system, and the encroachments of the ecclesiastical power upon the civil.

The rules are never spoken of by the text writers, or in any of the early reports, as originally a part of the common law, but as rules adopted into the common law; that is, borrowed from the canonists in the one case, and the civilians in the other. Blackstone uses this language:

“That this *nearness* or propinquity of degree, shall be reck-

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oned according to the computation of the civilians; and not of the canonists, which the law of England adopts in the descent of real estates; because, in the civil computation, the intestate himself is the *terminus, a quo* the several degrees are numbered; and not the common ancestor, according to the rules of the canonists." *Blackstone's Com.*, 2 vol., 504.

If this is the true reason of the rule, the reason fails with us, for as before stated, our statute does not search back for the common ancestor. 35 *Ind.*, *supra*.

In a note appended by Mr. Christian to the same volume of Blackstone, page 207, note 6, he says, in reference to the descent of real estate: "It is said that the canon law computation has been adopted by the law of England; yet I do not know of a single instance in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares of intestate personal property." He was perhaps mistaken in the assertion, which would carry the impression that seldom, if ever, was it necessary to refer to the rule of the canonists, in reference to real estate, but the main idea is correct as to the relative importance given by the common law to the two rules. The common law canons of descent not recognizing lineal ascent, but looking mainly to the immediate descendants of the person deceased, the difference between the two rules of computation was not often a matter of serious question. The rules of the cannon law as adopted into the English law of descents, as before stated, were the growth of the peculiar institutions of that country, and were in a great measure, if not entirely, local to that kingdom, and in nearly all the States of the United States, the system has been overturned as unsuited to our institutions and people.

To trace the rule of the civilians as adopted into the com-

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mon law of England, in reference to the distribution of personal estate, would take more time and space than I have at command.

In the first place, the king, under the prerogative of the crown, seized the personal estate, and disposed of it through his officers very much at his pleasure. Afterwards, the right was granted to "many lords of manors." Afterwards, the church was invested with this branch of the prerogative, under the assumption that, "none could be found more fit to have such care and charge of the transitory goods of the deceased, than the ordinary, who all his life had the care and charge of his soul." *Grysbrook v. Fox, Plowd, 277.*

This proved a delusion, however, for it was soon found that the church was appropriating the funds, except what the *conscience of the ordinary* would permit him to give to the wife and children of the intestate. Even the debts of the deceased were left unpaid. This, of course, led to trouble, and the liberty taken with the goods of deceased persons, was a matter of scandal to the church, and great oppression to the people, and was much complained of during the reign of Edward III, and in the sixteenth year of that king (in the year 1342) it was ordained, that debts should be paid, and the residue was to be given to pious objects, to persons of the blood of the deceased, the salvation of the souls of the dead, etc., and none to be retained by the ordinary, except something reasonable for his trouble. *Reeve's History of the English Law, vol., 3 pp. 85 and 230.*

This did not remedy the evil. The conscience of the ordinary was still trusted, and relations and creditors still suffered. The subject was still a theme of contention, between the ecclesiastical power and the courts of common law. During all the succeeding reigns, particularly that of Henry V, Henry VIII, Elizabeth, and James I, it was the subject of various acts of parliament, and finally in

the twenty-second and twenty-third years of Charles II, the statute of distribution was passed. Stat. at large, 1661 to 88, p. 347.

Nothing is said in that statute as to how the degrees of kindred shall be reckoned. As it was drawn by a civilian, and was conceived to have been copied from the 118th Novel of Justinian, it was always construed according to the rules of the civil law, and the rules of the civil law in computing degrees of kindred were always followed. The occasion of making this statute of distributions, was to end the long contest between the common law and the ecclesiastical courts. *Wallis v. Hodson*, 2 *Atkyns*, 115; *Edwards v. Freeman*, 2 *P. Wms.*, 435.

An interesting case illustrating the law as it previously existed, is that of *Carter v. Crawley*, decided in 1681. *T. Raymond's Rep.*, 496.

It is said of this statute "that it is little more than restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downward, many centuries before Justinian's laws were known in the western part of Europe. 2 *Blackstone's Com.*, 516; *Broom's Com.*, Vol. 2, 649; *Williams on Executors*, 1060.

It was claimed, that the abuses that had crept in, were but encroachments of the canonists upon the common law.

Granting dispensations for marriage, was a power claimed by the canonists, and by their rule of computing consanguinity, a greater number of persons were brought within the prohibited degrees, and hence their power and means of acquiring revenue from dispensations was increased, and hence their adherence to the rule.

In Britton, which was written about the beginning of the thirteenth century, a figure or "Arbor Consanguinitis" is

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spoken of in the chapter on degrees of kindred, as prepared by the author and inserted in the book.

In a note appended by Plowden, to the case of *Clere v. Brooks*, (*Plowden*, 451) a case decided in the fifteenth year of Elizabeth, and involving the descent of real estate, it is stated "Bracton and Britton also made mention that they had drawn out in their books a tree of parentage, by which it would plainly appear how the degrees of consanguinity are to be accounted; * * * * which figure or tree is not printed in either of their books, and, therefore, I have drawn it out in the line direct descending and ascending, according to the notion of Bracton, (as far as I am able to collect from his book,) which is agreeable to the civil law."

In the more recent edition of Britton by Nicholas, (vol. 2, p. 321) the tree is given, and is in accordance with the rule of the civilians.

The establishment of the feudal system, the right of primogeniture, and the yielding of the civil to the ecclesiastical power, were the growth of years. The liberty which characterized the ancient Saxons did not yield readily to such encroachments. By the ancient Saxon laws, lands descended equally to all the sons. Under William the Norman, the right of primogeniture was attempted to be established. Under Henry the First this was modified so that only the principal homestead went to the eldest son, and the rest was equally divided. It was at a still later period before the right was fully recognized, and with it, the recognition of the ecclesiastical power, and the rule of the canonists. 4 *Blacks.*, 421; *Stephen's De Lolme on the Eng. Const.*, vol. 1, pages 13, 41, and 43.

I see no reason to doubt, therefore, that what is known as the rule of the civil law, is as well a part of the ancient common law, and I believe even older, than the rule of the canonists; which was forced upon the common law by the encroachments of the ecclesiastical power.

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For the purpose of determining who is entitled to letters of administration, as the next of kin to the intestate, where the true degree of relationship was to be ascertained, the rule of the civilians has always been followed in England. 2 *Blackstone*, 208, note 6.

We have adopted the common law by statute, 1 G. & H., p. 515. Have we then in force in this State two modes of computing degrees of kindred; one to be observed in the descent of real estate, and the other in the distribution of personal estate? From 1817 to the revised code in 1843, the same statute in this State regulated the descent of both real and personal estate. *Revision of 1824*, p. 154; *revision of 1831*, p. 207; *revision of 1838*, p. 236.

In 1843, for some reason, the two provisions were separated, and statutes of descent and distribution were passed. *Rev. Stat. 1843*, pages 440 and 552.

In the revision of 1852, the descent of the real estate, and the distribution of personal property, are provided for in the same chapter and sections; but no rule of computing degrees of kindred is prescribed.

It is true that we might have two modes, the one relating to the descent of real estate, and the other the distribution of personal effects. But this would be inconvenient and would lead to confusion, without accomplishing any good purpose, and it is not likely that such was intended.

The leading text writers of this country have always laid down the civil law rule, as the one generally, if not universally followed in the United States. 4 *Kent's Com.*, 412; 2 *Washburn on Real Prop.*, 405; 2 *Hilliard*, 202; *Walker's Am. Law*, p. 356.

In Pennsylvania, where the common law has been adopted by statute, as in our State, and in Ohio where it has been held that the common law is in force, it is also held, that the rule of the civil law prevails in computing degrees of kin-

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dred, as being more in harmony with the spirit of our institutions, and showing the true degree of relationship by blood. *McDaniel v. Adams*, 45 *Penn. St.*, 430; *Penn and others v. Cox*, 10 *Ohio*, 22; *Clayton et al. v. Drake et al.*, 17 *O. S.* 367.

Not believing that it was ever intended or contemplated that degrees of kindred, under our statute of descent and distribution, should be computed in two different ways, but that the rule should be uniform, and believing the rule of the common law, which was adopted from the civilians, to be the better rule, as showing the true degree of relationship by blood, we hold it to be the rule that should be followed. In the case of *Hillhouse v. Chester*, 3 *Day's (Conn.) R.* 167, the Supreme Court of Connecticut held, that as real and personal estate descended by the statute of that State, in certain cases to *the next of kin*, it could not be supposed that one rule was intended to be adopted to ascertain who was *next of kin* as to the personal estate, and another as to the real estate; and that as the phrase *next of kin* was borrowed from the English statute of distributions, where it meant the nearest relation according to the rule of computation of the civil law, such meaning must attach to it when used by the statute. The rule of the canonists, as before stated, is no more a rule of the common law than is the rule of the civilians. From the very earliest period of the English common law, from the time its rules first began to be recognized and applied, we find the rule which is spoken of as the civil rule, recognized and followed as a rule of the common law, and applied in all cases where degrees of kindred were to be computed, except in the instance of the decent of real estate. The peculiarities of the English canons of descent, the growth, or remnants of feudalism that pervade them, the right of primogeniture, and the grasping after ecclesiastical power, led to the adoption of the rule of the canonists, and as we have cut loose from these, we should let the rule go with

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them, and adhere to the one best adapted to our condition of society and institutions.

In the third and next place, the claim of the defendants Mary Cloud and others, is based upon the principle of representation, as provided for in the second section of the statute of descents. Admitting that the rule of the civil law should prevail in computing degrees of kindred, they claim that being descendants of ——— Johnson, the great-grandfather of John W. Johnson, they inherit the share which the great-grandfather would have inherited, had he been living at the time of the death of John W. Johnson; that he was of equal degree of kindred to the intestate with Nancy Reagan, and that these defendants represent him, and are entitled to take the share which he would take if he were living.

Upon this point my opinion concurs mainly with the able argument of Gov. Baker in his brief.

The first section of the statutes of descents provides for descent to children. The second section provides, that if any child of the intestate shall have died, leaving descendants alive, they shall inherit the share which should have descended to the father or mother.

Thus far the two sections are canons of descent.

The following is then added to section two: "And grand children, and more remote descendants, and all other relatives of the intestates, whether lineal or collateral, shall inherit by the same rule," etc.

This latter clause is not a canon of descent; that is, it does not prescribe who shall inherit, but merely announces a rule by which those who are mentioned in the preceding and succeeding sections shall inherit. While the principle of representation is one that has always been favored by the civil law, and is in accordance with the genius of our statute, it is not one to be applied in every conceivable case, and it is only to be used where the terms of the succeeding sections of the statute make it applicable.

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In the third section it should be applied. By that section, if an intestate dies without lawful issue or their descendants alive, one-half the estate goes to the father or mother, or the survivor, if either be dead, and the other half to the brothers and sisters *and to the descendants* of such as are dead. Here may be an application of the rule to collateral relations. But for the rule, if an intestate should leave two brothers and four nephews, children of the deceased brother, him surviving, one-half of the estate would be equally divided between the six heirs, the two brothers and four nephews. With this rule, the half would be divided into three equal parts, the four nephews taking the part which would have descended to their father had he been living.

The fourth section affords another instance where the application of the rule is expressly provided for.

The latter part of the fifth section does not, in my opinion, afford any room for the application of the principle. In the absence of all persons entitled to take by the preceding sections, and of those who are named as entitled to take in the first clause of the fifth section, it is provided, that the estate "shall go to the next of kin in equal degree of consanguinity." I take this to mean, the next of kin who are living at the death of the intestate. To say that it means a class of persons whose ancestors, if living, would inherit it, seems to me would be making a new canon of descent. This we can not do by judicial construction. The demurrer to the answer of Mary Cloud and others, should, therefore be sustained.

NOTE.—This cause was disposed of by judgment at Special Term, in accordance with the foregoing rulings, and afterwards affirmed in General Term on Judge Blair's opinion.—REPORTER.

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IN SPECIAL TERM, 1873.

EDWARD D. SCUDDER v. THE INDIANAPOLIS, PERU AND
CHICAGO RAILWAY COMPANY.

RAILROAD—*track a warning of danger—*

NEGLIGENCE—*walking on track of railroad, of plaintiff and
defendant—*

CITY ORDINANCE—*violation of, in running locomotives, and
trains.*

A railroad track is of itself, notice, or warning of danger to any foot passenger crossing, or walking thereon. Such track is not constructed for a foot-way, but is to be used for running trains of cars and locomotives, propelled by an agency, and with a momentum that renders such trains and locomotives impossible of instant and complete subjection to the will of those in charge of the same.

A person who assumes to walk upon the track of a railroad, is bound to use more care and diligence, and to keep a better lookout for approaching danger, than if walking upon an ordinary road or foot-way.

On approaching a person walking upon the track of a railroad, the engineer, or person in charge of a train, or locomotive, has a right to presume that the person so walking upon the track will get out of the way. The engineer, or persons in charge of the train, must not steal upon him; and if the usual signals of approach are unheeded, and danger imminent, it is their duty to use all means at their command to stop the train and avoid injury, even to a person who is on the track without right.

A mere habit of using the tracks of a railroad with the knowledge of the railroad company, but without invitation from the company, will not lessen the degree of care required of those so using the track.

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Where the right of a plaintiff to recover, is based on the negligence of the defendant, the plaintiff must be free from negligence contributing to the injury. The right to recover in such case does not depend upon measuring the degrees, or amount of negligence between the plaintiff and the defendant, and ascertaining which was most negligent, or whose negligence contributed most to cause the injury.

A person who is walking upon the track of a railroad, or about to step upon such track, must exercise care in looking to see if trains or locomotives are approaching, and a failure to look, under such circumstances, is negligence.

The running of a locomotive, or trains of cars, at a rate of speed declared to be unlawful by the ordinance of a city, or running the same backward without a watchman on the rear, contrary to such ordinance, is not, merely on account of the violation of the ordinance, an act indicating, or tending to prove a wilful purpose, or intent to commit an injury, if without the ordinance, the running under such circumstances would only be an act of negligence. The violation of such ordinance is not of itself evidence of anything more than negligence, and is not conclusive evidence of negligence.

If an engineer in charge of a locomotive, or train of cars, looks ahead and sees a man walking at the side of the track, it is not his duty to infer that the man will walk into danger in front of his engine when it is approaching near, and giving the usual signal of approach.

Where a person walking by the side of a railroad track, heedlessly or negligently steps upon the track in front of an approaching locomotive, he cannot recover unless those in charge of the locomotive saw his peril, or could, by the use of ordinary diligence, have seen it in time to prevent the injury, after it became apparent that he was in danger.

(The motion for a new trial was filed in Special Term, and at the request of Judge Newcomb, who heard the cause, the motion was heard by the full bench, and the following opinion rendered by Blair, Judge.—REPORTER.)

BLAIR, J.—The plaintiff was injured within the corporate limits of the city of Indianapolis, by a locomotive and tender of the defendant, which was being run upon the track of the Cincinnati, Cleveland, Columbus & Indianapolis Railway Company. The point where the injury occurred was north of Ohio street, between Ohio and Winston streets. At the point where the plaintiff was injured, and south of it, there are two tracks, the western one used for the trains

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going north, and the eastern one for the trains going south. North of the point of injury, other tracks branch off and pass to the northeast, crossing Winston street diagonally, and continue on through the square bounded on the west by Winston street, south by Ohio street, and north by New York street, crossing New York street, and entering the depot and yards of the latter company. At the west line of Winston street there are three tracks, and by the time the south line of New York street is reached, there are eight tracks. From Ohio street to Winston street the tracks pass through lots belonging to the C. C. C. & I. Railway Company, distance of sixty-five feet.

From the west line of Winston street to New York street, on the route of the tracks, the distance is five hundred and fifty feet.

The plaintiff was employed at a saw-mill north of New York street, and was familiar with the entire locality, and the manner in which the tracks were used, and knew that locomotives and trains were continually passing thereon. On the day of the injury, he started, with a companion by the name of Kirchoff, to go to some point south of Ohio street. On New York street his companion stopped to talk with one Resener, and the plaintiff walked southward on the third track from the east, continuing on that track until it became united with the western tracks, and until he reached a point on Winston street, and from there he walked between the tracks across the lots of the Company, to the point where he was injured, between Ohio and Winston streets. At the point on Winston street, where the plaintiff stepped between the two tracks, he heard a passenger train moving north on the west track (that being the one he was then on), and he stepped off to the east, a distance that he thought would be safe from any danger from the passenger train, and continued on his course southward. The locomotive of the defendant,

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from which he received the injury, was backing from the yards north of New York street, and was passing upon the second track from the east; from the east line of Winston street, or before the locomotive passed upon the eastern track, there being but the two tracks at the point where the plaintiff was injured, the bell of the defendant's locomotive was ringing, but there was no one upon the tender as a lookout, and there was a backboard enclosing the back of the cab, to protect the employes from cold, it being very cold weather at the time. The space between the two tracks, where the plaintiff was walking, was such that engines and cars could pass each other, leaving a space of at least three feet seven inches between them.

The passenger train approached the plaintiff from the south, and as the engine came opposite him he stepped over toward the eastern track, approaching so near it that the locomotive and tender of the defendant, coming up behind, struck him, causing the injury complained of.

The plaintiff's companion, Kirchoff, after his conversation with Resener, on New York street, followed on after the plaintiff, and when about midway between New York and Winston streets, the defendant's locomotive and tender passed him, and the plaintiff was then not far from the middle of Winston street, or about two hundred and seventy-five feet distant. This was about the time the plaintiff heard the passenger train coming north on the track he was then walking on, and he stepped between the two tracks and kept on his course.

Kirchoff says he watched the plaintiff from the time he left New York street; he saw him step from the track the passenger train was going out on, and says: "At first he walked along right between the track the pony was on, and then he went over a little too far, and the pony was backing down and the Bee Line accommodation coming at the same time."

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At the point where the plaintiff stepped off the western track and started on between the two tracks, he could, by looking back, have seen the defendant's locomotive as far back as New York street, or even two hundred feet beyond, and the line of vision could not have been perceptibly changed, or shortened, from that point to the place where he was injured. The plaintiff says he had looked back just before he was injured, but saw nothing coming from behind. Kirchoff followed the plaintiff from New York street, and says in his testimony, that he watched him and did not see him look back.

The plaintiff was in full possession of the senses of sight and hearing, and says he did not stop at all, but kept moving right along.

The engineer testifies, that when he crossed New York street, he saw the tracks all the way to the point where the plaintiff was injured, and he only saw one man, and he was walking upon the track west of the one upon which the engine was moving. The engineer and his engine, when at New York street, were about five hundred and eighty feet from the place where the plaintiff was struck. There is nothing in the evidence to show that the engineer took any further notice, until the plaintiff was injured, and the flagman signaled the engine to stop. There is some conflict in the evidence relating to the speed with which the engine was being run. The plaintiff and Kirchoff place it at about eight miles per hour; other witnesses about four. The ordinance of the city was introduced in evidence by the plaintiff, declaring that it is unlawful to run trains in the city at a greater rate of speed than four miles per hour, and also to run a train backwards without a watchman, or other person on the rear end of the train.

There was, therefore, evidence from which a jury might find, that the engine was being run at a greater rate of speed

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than four miles per hour, and in considering a motion for a new trial, we will examine the case as if the jury had so found. As to the other facts, there is no conflict in the evidence, except as the testimony of the plaintiff and of Kirchhoff, a witness for the plaintiff, may conflict upon the question whether or not the plaintiff looked back about the time he stepped between the two tracks.

The complaint is in two paragraphs. The first is founded upon the theory of a recovery for an injury resulting from a negligent act of the defendant's servants, without any fault on the part of the plaintiff contributing thereto. The second seeks a recovery on the ground of "careless, negligent, willful, reckless and intentional acts" of the defendant's servants, irrespective of any allegation that the plaintiff was without fault.

The cause was tried in room No. 2, and resulted in a verdict for the plaintiff. The defendant has filed a motion for a new trial, and at the request of the Judge who heard the cause, the motion was heard by the full bench.

In support of this complaint we have the following undisputed facts :

The plaintiff, knowing the manner in which the tracks were used, knowing that a great number of trains were constantly passing thereon, walked upon the line of the tracks. Seeing a train approaching upon the track he was walking on, he passed from it to the space between the two tracks, where there was barely room to stand or walk without being endangered by passing trains, and from thence he stepped within the range of cars passing upon the other track, without looking to see if there was any train about to pass thereon ; or if he did look, it was but a careless glance and availed nothing, when reasonable care in looking, would have disclosed the danger in ample time to have avoided it.

The servants of the defendant, were running their loco-

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motive and tender upon the track where they might lawfully run it. It was being run at a rate of speed declared by an ordinance of the city to be unlawful; the bell was being rung, and when about five hundred and eighty feet from the point where the injury occurred, the engineer looked and saw that his track was clear, and passed on, not seeing the plaintiff until after he was injured; and there was no lookout or watchman on the rear of the tender.

Except in so far as the circumstances under which each party was placed, necessarily require it, the same rules of law apply both to the plaintiff and the defendant. A railroad track is of itself, notice, or warning of danger, to any foot passenger crossing, or walking thereon. It is not constructed for a foot-way, but is to be used for running trains of cars and locomotives, propelled by an agency, and with a momentum that renders such trains and locomotives impossible of instant and complete subjection to the will of those in charge, nor can they be turned aside to avoid injuring any one.

It is easy for a person who is walking, to control his steps and his course.

In cases of ordinary travel, upon a highway, it is a well recognized and wholesome rule of law, that "a person who leaves the ordinary side of the road is bound to use more care and diligence, and to keep a better lookout to avoid concussion, than would be requisite if he were to confine himself to the proper side." *Wynn v. Allard, 5 Watts and Sergt.*, 524.

The principle contained in this rule, is much more applicable to one who assumes to walk upon the track of a railroad, where a neglect to use care is likely to be attended with more fatal results. The purposes for which railroads are constructed and the exacting demands of the public, would be but illy served, if engineers were required, by a rule

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of law, to stop on approaching within a few hundred feet of a foot passenger, and give him time to pursue his journey, or leisurely get out of the way. On approaching a person walking upon the track, the engineer has a right to presume that he will get out of the way. He must not steal upon him; and if he sees that the usual signals of approach are unheeded, and danger eminent, it is his duty to use all the means at his command to stop the train and avoid injury, even to a person who is on the track without right.

It is claimed by the defendant, that the plaintiff, in passing along the tracks on the private grounds of the Railroad Company, was a trespasser, and for that reason he cannot recover, unless the infliction of the injury, was a willful act on the part of the servants of the defendant. In view of the fact that there was evidence tending to show that, with the knowledge of the Railroad Company, persons were in the habit of passing where the plaintiff was injured, we are not prepared to say that he was a trespasser, but we would say, that a mere habit of so using the tracks, without invitation from the company, would not lessen the degree of care required of those so using them, nor would it increase the defendant's liability as far as the facts and the law of this case are concerned.

Where the right of a plaintiff to recover is based on the negligence of the defendant, the plaintiff must be free from negligence contributing to the injury. This principle is so well settled that it needs no citation of authorities. It is not questioned. It is a principle older than railroads and locomotives, and applicable as well to individuals as to corporations. It is the growth of long experience, in settling matters of difficulty growing out of the negligent acts of parties, and we are not at liberty to vary or change the rule. The right of a plaintiff to recover in such case, does not depend upon measuring the degrees, or amount of negligence, between the plaintiff and the defendant, and ascertaining which was most

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negligent, or whose negligence contributed most to cause the injury complained of. The question is this: Was the defendant negligent, and was the plaintiff free from negligence that contributed to his own injury?

How, then, stands the case of the plaintiff, on the facts about which there is no conflict; or if conflicting, taking them most favorably to the plaintiff and most unfavorably to the defendant?

1st. The plaintiff voluntarily placed himself in a place of great danger, by walking on the western track of the railroad.

2d. He removed himself from that place of danger, to a place between the tracks, where, by the exercise of proper care, he was safe.

3d. He negligently stepped from that place of safety, to another place of danger, and was there injured by the locomotive and tender of the defendant.

His negligence, in the latter instance, consisted mainly in not looking, or looking so carelessly that it availed nothing, when by the exercise of care in looking, he could readily have seen the approaching danger and avoided it.

The authorities are numerous, showing that a failure to look, under such circumstances, is negligence. *Bellefontaine, &c., Co. v. Hunter*, 33 Ind., 335; *Toledo & etc. Co. v. Goddard*, 25 Ind., 185; *Stout v. Indianapolis & St. Louis R. R. Co.*, 1 Sup. C. Marion Co., 80.

This proves that there could be no recovery under the evidence, unless it was shown that the conduct of the defendant's servants was more than merely negligent, unless it was shown that their conduct was such as to warrant us in implying a willful purpose to commit the injury on the part of the servants of the defendant.

Applying the same rule as before, that is, giving the evidence the greatest force in favor of the plaintiff and against

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the defendant which the rules of law will permit, and we have:—1st, The locomotive and tender were being run at a rate of speed declared to be unlawful by an ordinance of the city; 2d, The locomotive was being run backwards, and there was no watchman on the rear of the tender; 3d, The engineer in charge was negligent in not looking out to avoid injuring any one.

The locomotive was not being run at a rate of speed that could, under the circumstances, be considered reckless, nor is it clear that it was a violation of the ordinance to run it backwards without a watchman on the rear of the tender.

The ordinances in evidence were evidently passed for the purpose of protecting persons from injury by the running of trains at an unsafe speed, and without proper care to avoid injury to persons and property; and such ordinances should be enforced.

The violation of these ordinances does not necessarily result in injury, nor is it necessary that an injury should result, in order to constitute a violation.

Their violation does not, merely on account of the violation, change the act which is declared to be unlawful, from an act of negligence, (if without the ordinance it would only be an act of negligence,) to that of an act, indicating, or tending to prove, a willful purpose, or intent, to commit an injury. Similar ordinances and statutes are not uncommon. In many of the States, a penalty is imposed by statute, upon railroad companies, if they neglect to ring the bell upon their engines, a certain distance before reaching a road-crossing. While numerous cases have arisen, where parties have been injured, and the defendant was guilty of violating similar statutes and ordinances, we have found none where such violation has, of itself, been held to be evidence of anything more than negligence; and such violations are not even conclusive evidence of negligence. *Taffe v. Madison & I. R.*

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R. Co., 37 *Ind.*, 361; *Ernst v. Hudson River R. R. Co.*, 35 *N. Y.*, 9; *Wright v. Malden &c.*, *R. R. Co.*, 4 *Allen*, 243; *Sherman and Redfield on Negligence*, p. 543, § 485; *Langhoff, Admr. v. The Milwaukee & Prairie Du Chien R. R. Co. et al.* 19 *Wis.*, 489; *Brown v. Buffalo &c. R. R. Co.*, 22 *N. Y.*, 191; *The Augusta & Savannah R. R. Co. v. McElmurry*, 24 *Ga.*, 75.

While, for the purpose of putting the facts as strongly as possible against the defendant, we have said that the engineer was negligent in not looking out to avoid injury to any one, it is impossible to construe it into anything more than negligence. An engineer and fireman have other duties to perform, as well as to look to the track ahead of them, and it would be applying a rule of difficult, if not impossible, application, to say that one or the other of them should continually be looking along the track. The engineer says, that on crossing New York street he did look, and saw that the track he was using, was clear beyond the point where the injury occurred. There is nothing in the evidence, that tends to cast a doubt upon the truth of this statement. He says he saw one man, but he was not on his track. He had no reason to assume, nor was it his duty to infer, that the man he saw, or any one else, would walk into danger in front of his engine, when it was approaching so near, and giving the usual signal of approach by ringing the bell.

The track on which the locomotive and tender was being run, was clear, and there was no one in danger, or imminent peril, until the plaintiff, by less than the distance of one step, placed himself in danger, and that, so suddenly, that the engineer could not have stopped his engine in time to have prevented the injury. If the engineer had been carefully watching the plaintiff all the time, he would have seen that he was in a place, where he might be passed in safety, and as before stated, he would not, under such circumstances, be bound to infer that the plaintiff would suddenly step so near his track as to be in danger.

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There has been some uncertainty and confusion in the adjudged cases, in attempting to define the right of the plaintiff to recover, though he has himself been negligent. Much of this has arisen from the incautious use of terms and expressions, in cases where the question was unimportant. It is not necessary in this case, to make a critical examination of this question. Cases where a recovery under such circumstances is possible, do not often occur, and an attempt to bring every case within the rule permitting such recovery but serves to confuse, without accomplishing any good purpose.

In the case of *Bellefontaine, etc., Co. v. Hunter, supra*, it is said, that where the plaintiff has been negligent there can be no recovery, "unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury; and this can only be attributed where the company has notice of the particular emergency in time, by the use of ordinary diligence, the means being at hand, to avoid a collision."

The latter part of the seventh instruction given by the Court, in this case, is to the same effect, and is a correct and clear statement of the law. It reads as follows:

"It is important to inquire at this point whether the space between the two tracks was sufficient there, to enable the plaintiff to avoid danger from the passenger train, without approaching so near the other track as to be in danger from trains that might pass on the latter. If there was such sufficient space, and the plaintiff heedlessly or negligently went so near the latter track as to meet the injury of which he complains, or could by the use of his sense of sight or hearing have discovered the approach of defendant's locomotive, then his carelessness was such as to preclude a recovery in this action, unless the persons in charge of defendant's locomotive saw his peril, or could, by the use of ordinary dili-

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gence, have seen it in time to prevent the injury, *after it became apparent that he was approaching the track too close for safety.*"

In this connection we refer also to the language of the Court in the case of *The Northern Central Railway Co. v. The State*, 31 Md., 357, at p. 366.

"But it is true that, in some cases, there may be negligence in both parties concerned, and yet an action may be maintained; but in such cases it must appear either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured parties, neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled, and are regarded as equally proximate to the effect produced, and are therefore not susceptible of apportionment."

Many other cases might be cited of the same purport. Under the rule, as thus defined, the facts in the case at bar do not show an "intent or willingness," to cause the injury received by the plaintiff.

The acts of the defendant's servants were acts of negligence and nothing more, and hence there could be no recovery on the second paragraph of the complaint.

We have not given the instructions a critical examination; but in the main they are undoubtedly correct. The eighth, given by the court, reads as follows: "8. If the plaintiff was walking by the side of the track upon which defendant's engine approached him, and not on it, the employes of the defendant were not required to anticipate that he would step upon the track or within the reach of defendant's engine,

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and had a right to assume that he would not step upon the track, or within the reach of the engine, and if just as the engine approached him he stepped upon the track or within the reach of the engine, and if promptly, upon the signal of danger being given, the defendant's employes stopped the engine, but the time was so short that the plaintiff was, notwithstanding this, injured, he can not recover on the first paragraph of the complaint."

The state of facts on which the instruction was based follows those which were clearly proven in the cause, and preclude a recovery equally as well upon the second as upon the first paragraph of the complaint. Limiting their application to the first paragraph, may have led the jury to infer that they had no application to the second; and that the recovery upon the second was still an open question, though these facts were found to be true; there being no similar instruction applied to the second paragraph of the complaint.

We are, therefore, of opinion that the motion for a new trial should be sustained.

NOTE.—The Court, in Special Term, upon its own motion, instructed the jury as follows:

1. "It has been conceded in the argument by the defendant's counsel that the plaintiff was struck by the tender of a locomotive belonging to and used by the defendant; that the plaintiff was knocked down by the stroke, and that the tender and locomotive passed over his arm, crushing it so that amputation of the injured member became necessary.

It is also undisputed that the accident or injury occurred on a part of the track of the Cincinnati, Cleveland, Columbus & Indianapolis Railway Company, more briefly known as the Bellefontaine Railroad Company, in the city of Indianapolis, so on these points you will have no difficulty in coming to a conclusion.

2. A question has been raised in the argument whether defendant's locomotive had a right to be in the place where plaintiff was injured.

If defendant was using said track by the consent, express or implied, of the company owning the same, for the purpose of transferring freight cars from one part of the city to another, or for any other lawful purpose, then

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defendant was, for the time being, in the lawful possession of the track, and had the same rights there, as to strangers, as the corporation owning the road would have had if the locomotive belonged to it instead of the defendant.

3. Some question has been made, also, as to whether the plaintiff was not unlawfully trespassing upon the railroad track at the time and place where he was injured. If you find that the injury happened on the private grounds of the Bellefontaine Company, and not on a public highway, the plaintiff was a trespasser, unless he was there by the express or implied license of that company; but if you find, from the evidence, that the railroad track, and the spaces between them at that point, had, for a long time previous, been freely used by pedestrians who had occasion to pass from Washington or Ohio streets to the neighborhood of the Bellefontaine freight depots and shops, and that such use had been acquiesced in by said company, without protest or warning against it, you will be authorized to infer a license by said company for such use of its tracks, subject, of course, to the free and unobstructed use of said tracks for railroad purposes.

4. But a person so entering upon a railroad track at such a place, must observe care and caution for his own safety proportioned to the danger he incurs by this act, and must not omit any reasonable precaution to avoid contact with trains upon the road.

5. To enable the plaintiff to recover on the first paragraph of his complaint, you must find, from the evidence, that the defendant's servants, at the time the plaintiff was injured, ran said locomotive carelessly and negligently, and that the plaintiff was not himself guilty of any negligence that directly contributed to the injury.

6. What is negligence in this case depends on the circumstances surrounding the transaction, the place where the act complained of occurred, the degree of danger likely to be incurred by using the railroad as a footway; and in regard to the acts of the plaintiff which are imputed to him by the defendant as negligence, on the previous knowledge he had of the extent to which the tracks were usually employed in the passage of trains, the frequency and regularity, or irregularity, of such trains, and the facilities for seeing the tracks in each direction from him, and for seeing trains approaching in either direction thereon.

Did the plaintiff know that locomotives and trains very often passed in both directions along the part of the road he was on when injured, and at irregular intervals? If he did, then greater care and caution was required of him than if he had been on a track where trains were infrequent, or when they came at regular intervals, and he entered upon the track between such intervals; and, on the other hand, if foot passengers were frequently met at the place where plaintiff was injured, greater care was required of the defendant to prevent injury than would be requisite in places where

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foot passengers were seldom met, and would not reasonably be expected to be found on the track.

7. One of the uncontroverted facts in this case is, that the plaintiff started to walk down the railroad to Ohio street on a track other than the one upon which he received the injury; that between New York and Ohio streets he saw a passenger train of the Bellefontaine Company approaching him; that to get out of its way, he stepped off that track into an open space between that and the track to the southeast, and that in avoiding the passenger train, he approached so near to the latter track as to bring his person in contact with the tender of the defendant's locomotive, which was backing down toward Ohio street, and thus received the injury complained of.

It is important to inquire at this point whether the space between the two tracks was sufficient there to enable the plaintiff to avoid danger from the passenger train, without approaching so near the other track as to be in danger from trains that might pass on the latter. If there was such sufficient space, and the plaintiff heedlessly or negligently went so near the latter track as to meet the injury of which he complains, or could by the use of his sense of sight or hearing have discovered the approach of defendant's locomotive, then his carelessness was such as to preclude a recovery in this action, unless the persons in charge of defendant's locomotive saw his peril, or could, by the use of ordinary diligence, have seen it in time to prevent the injury *after it became apparent that he was approaching the track too close for safety.*

8. If the plaintiff was walking by the side of the track upon which defendant's engine approached him, and not on it, the employees of the defendant were not required to anticipate that he would step upon the track or within the reach of defendant's engine, and had a right to assume that he would not step upon the track or within the reach of the engine, and if, just as the engine approached, he stepped upon the track or within the reach of the engine, and if promptly, upon the signal of danger being given, the defendant's employees stopped the engine, but the time was so short that the plaintiff was, notwithstanding this, injured, he can not recover on the first paragraph of the complaint.

9. At the point where the plaintiff was walking at the time of the injury, the railroad company was entitled to the exclusive use of the road bed and tracks, and the plaintiff was bound to take notice of this right, and that the use to which the railroad company put it was one of great danger to passers. He was bound to use his senses of sight and hearing to anticipate the approach of engines, and if, with careful use of those senses, he might have known that the defendant's engine was approaching, and did not, he was guilty of such negligence as will prevent a recovery on the first paragraph of the complaint.

10. Certain ordinances of the city of Indianapolis have been put in

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evidence limiting the speed at which railroad trains may run through or in said city, and also requiring trains, in backing, to have a watchman or person on the rear of the train in order to avoid accidents. It was the duty of the defendant to observe those ordinances, and the public had a right to expect obedience to them, and if you find that the injury to the plaintiff was occasioned by the failure of the parties in charge of defendant's locomotive to observe the requirements of those ordinances, or either of them, and there was no want of ordinary care on his part to avoid the injury, then you should find for the plaintiff; but if you believe, from the evidence, that the injury would have occurred all the same if said ordinances had been obeyed, then the ordinances can add nothing to the defendant's liability in this case, and you will decide it on the general principles I have laid down, irrespective of such ordinances.

11. In short, the law exacts ordinary care on the part of a railroad company in the running of its trains, and the same degree of care is required of persons going upon the railroad track. If an injury occurs by the want of this degree of care on the part of the company, in a case like the present, and ordinary care is used by the injured party to avoid danger, the latter has a right to recover such damages as he may sustain by the careless act of the railroad company; but if the carelessness of the injured party immediately contributed to the injury, he can not recover. A plaintiff can not recover in a case like this, on the ground of any negligence, if it appears that by the want of ordinary care or prudence on his part, he directly contributed to the injury, or, in other words, if by the exercise of ordinary care and prudence he might have avoided the injury.

Where negligence is the issue, it must be unmixed negligence to justify a recovery; and if both parties, by their negligence, immediately contributed to produce the injury, neither can recover.

12. The second paragraph of the complaint does not claim that the plaintiff was without fault, but the right of recovery is based on the ground of the willful or wanton misconduct of the servants of the defendant. To sustain this paragraph of the complaint, the evidence must satisfy you by a fair preponderance, of the truth of one at least of the following propositions:

1. That the person or persons in charge of defendant's locomotive, purposely ran over the defendant, when the engine might have been stopped in time to prevent the injury; or,

2. That the servants of the defendant were ignorant of the presence of plaintiff on the track, but were running the locomotive, in a manner so wanton and reckless, as to show a willingness on their part to run over any and all persons who might get on the track, without using any diligence to prevent injury to them, indifferent whether such parties were run over or not.

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In the language of our Supreme Court in another railroad case: "Recklessness in the management of the train is such gross negligence as is utterly regardless of consequences."

If you find from the evidence that the injury to the plaintiff was willfully, that is, purposely, inflicted by defendant's servants, or that if not purposely done in the given case, their conduct was so wanton and reckless of consequences as to imply a willingness to run over any person who might get upon the track, then you should find for the plaintiff on the second paragraph, but not otherwise."

To the giving of these instructions, and each of them, the defendant, at the proper time, excepted.

The Court instructed the jury upon the plaintiff's motion as follows:

10. "If you find a verdict for the plaintiff, he is entitled to recover not only the damages which he suffered prior to the commencement of this action, but also all damages proceeding continuously from the injury complained of, which he has suffered to the present time, and all which it is reasonably certain that he will suffer in the future. In arriving at the amount of such damages you will take into the account the value of the time lost by him in consequence of such injury; a fair compensation for the physical and mental suffering caused by the injury to the present time, and for such suffering in the future (if any) as the evidence renders it *reasonably certain* must necessarily result from the injury; and any permanent reduction of his power to earn money, taking into consideration the health and physical and mental ability of the plaintiff before the injury complained of as compared with his condition afterwards in consequence of the injury, and how far such disability is permanent in its results; and upon the whole allow him such damages as in your opinion will fairly compensate him for the loss and injury which you may find he has so sustained. And should you believe, from the evidence, that the carelessness of the defendant in causing such injury was so gross as to amount to reckless and willful negligence, you may then add to the damages found, as compensation, such additional sum, by way of punishment to the defendant and example to others, as you may think the circumstances of the case demand, not exceeding in the aggregate the amount demanded in the plaintiff's complaint."

To the giving of this instruction the defendant, at the proper time, excepted.

Council for defendant, by brief, argued.

In defining *negligence*, in *Shearman and Redfield on Negligence*, § 2, it is said:

"Negligence, in correct legal phraseology, is more nearly synonymous with carelessness than with any other word. It signifies, primarily, want

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of care, caution, attention, diligence, skill, or discretion, in the performance of an act, by one having no positive intention to injure the person complaining thereof. Where such an intention exists, the act ceases to be merely negligent, and becomes one of violence or fraud. The secondary meaning of 'negligence' includes every omission to perform a duty imposed by law for the avoidance of injury to persons or property."

Ordinary care, is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances.

(*Toledo, etc., Co. v. Goddard*, 25 *Ind.*, 185; *Maynard v. Buck*, 100 *Mass.* 40; *Barrow v. Eldridge, Id.*, 450; *Cass v. Boston, etc., Co.*, 14 *Allen*, 448; *Shaw v. Boston, etc., Co.*, 8 *Gray*, 45; *Shrewsbury v. Smith*, 12 *Cush.*, 177; *Sullivan v. Scripture*, 8 *Allen*, 564; *Cayser v. Taylor*, 10 *Gray*, 274; *Johnson v. Hudson River, etc., Co.*, 6 *Duer*, 688; *Ernst v. Hudson River, etc., Co.*, 85 *N. Y.*, 9-27.)

There is a difference between the degrees of care required in particular cases.

For instance, the highest degree of care is required of a carrier of passengers, while only ordinary care is required of a railroad company in its relations to a person crossing the track at a public crossing.

A failure to exercise this high degree of care in favor of a passenger, and ordinary care in favor of a passer at a highway, will render the railway company responsible, where there is no fault on the part of the injured party.

The character of the negligence varies with the degree of care required, in the cases stated. Where the degree of care required in a particular case is ascertained, the law fixes what constitutes such negligence as will render the railway company liable to the injured party. In such case there are no degrees of negligence.

And when the railway company, in a particular case, is guilty of that degree of negligence which renders it liable for the act or omission complained of, there is no legal measure by which it can be distinguished from another degree of negligence, so that one can be called *ordinary* and another *gross* negligence.

The addition of the word *gross* is merely describing *ordinary* negligence, with a vituperative epithet, and has no legal significance.

(*Wilson v. Brett*, 11 *M. & W.*, 118; *Beal v. South Devon Railway Co.*, 3 *H. & C.*, 837; *Grill v. The General Iron Screw Collier Co.*, *L. R.* 1, *C. P.* 600; *Hinton v. Dibbin*, 2 *Q. B.*, 646; *Austin v. Manchester, etc., Co.*, 10 *C. B.*, 454, 474; *McPheeters v. The Hannibal, etc., Co.*, 45 *Mo.*, 22; *New World v. King*, 16 *How.*, (*U. S.*) 474; *Evansville, etc., Co. v. Lowdermills*, 15 *Ind.*, 120; *Grill v. Middleton*, 105 *Mass.* 477.)

The words *reckless* and *wanton* indicate a degree of wrong, lower in degree than *willful*.



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If, therefore, the defendant would not be liable for a *willful* injury unless the plaintiff's danger was known, and the defendant could have avoided injuring him and omitted to use the means possessed for its accomplishment, there could not be liability for a *reckless* or *wanton* injury, unless the same knowledge and omission existed.

Where negligence is the issue, it must be a case of *unmixed* negligence to authorize a recovery.

(*The Toledo, etc., Co. v. Goddard*, 25 Ind., 185; *Newhouse v. Miller*, 35 Ind., 463; *Indianapolis, etc., Co. v. Harter*, 38 Ind., 557; *Bellefontaine, etc., Co. v. Hunter*, 33 Ind., 335; *Waters v. Wing*, 59 Penn. St., 211; *Catawassa, etc., Co. v. Armstrong*, 49 Penn. St., 186; *Indianapolis, etc., Co. v. Rutherford*, 29 Ind., 82; *Shearman & Redfield on Negligence*, § 84.)

The plaintiff can not recover if he omitted to use his senses of sight and hearing.

(*Bellefontaine, etc., Co. v. Hunter*, 33 Ind., 335; *Toledo, etc., Co. v. Goddard*, 25 Ind., 185; *Burns v. Boston, etc., Co.*, 101 Mass., 50; *Allyn v. Boston, etc., Co.*, 105 Mass., 77; *Barker v. Savage*, 45 N. Y., 191; *Gorton v. Erie, etc., Co.*, 45 N. Y., 661; *Railway Company v. Whittan*, 11 Wall., 270; *Morris, etc., Co. v. Haslan*, 4 Vroom, 147; *Hewett v. New York, etc., Co.*, 3 Lansing, 83; *Stout v. Indianapolis, etc., Co.*, *Wilson's Superior Court Rep.*, 1, 80; *North Pennsylvania, etc., Co. v. Heilman*, 49 Penn. St., 60; *Ohio, etc., Co. v. Eaves*, 42 Ill., 288.)

The mere fact that the public were in the habit of passing where the plaintiff was injured, without invitation on the part of the company, imposes no restriction upon the company as to the manner of using its tracks, and does not increase the company's liability.

(*Hounsel v. Smith*, 7 C. B. (N. S.), 781; *Binks v. South Devon, etc., Co.*, 3 Best & Smith, 2 Q. B., 244; *Sweeny v. Old Colony, etc., Co.*, 10 Allen, 368; *Zorbisch v. Tarbell*, 10 Allen, 385; *Nicholson v. The Erie, etc., Co.*, 41 N. Y., 525; *Holmes v. The Central, etc., Co.*, 37 Geo., 596; *The Little Schuylkill, etc., Co. v. Norton*, 24 Penn. St., 465; *Gillis v. Pennsylvania, etc., Co.*, 59 Penn. St., 129; *Philadelphia, etc., Co. v. Spearen*, 47 Penn. St., 300; *Philadelphia, etc., Co. v. Hummel*, 44 Penn. St., 375; *Flower v. Pennsylvania, etc., Co.*, 69 Penn. St., 210; *Hickey v. The Boston, etc., Co.*, 14 Allen, 429; *Lucas v. New Bedford, etc., Co.*, 6 Gray, 64; *Gavit v. Manchester, etc., Co.*, 16 Gray, 501; *Shearman & Redfield on Negligence*, §§ 38, 491, 493.)

Being on a railroad track, where he had no right to be, was negligence, contributing to the injury.

(*Railroad v. Norton*, 24 Penn. St., 465; *Heil v. Glanding*, 42 Penn. St., 493; *Shearman & Redfield on Negligence*, § 88, § 493; *Evansville, etc., Co. v. Hiatt*, 17 Ind., 102; *Philadelphia, etc., Co. v. Hummel*, 44 Penn. St., 375; *Singleton v. Eastern Counties, etc., Co.*, 7 C. B. (N. S.), 287).

At a highway crossing even the rights of the railway company are supe-

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prior to those of the public. *Warner v. The New York, etc., Co.*, 44 N. Y., 386.

In the case of *Bellefontaine, etc., Co. v. Hunter*, 33 Ind., 335, the true principle is stated thus, on page 364:

"We think the law may be regarded as fixed, that no neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available, and injury where the use of either of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence, and there can be no recovery, unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury; and this can only be attributed where the company has notice of the particular emergency in time, by the use of ordinary diligence, the means being at hand, to avoid the collision."

Referring to the case of *The Indianapolis, etc., Co. v. McClure*, 24 Ind., 370, and the extract from *Redfield* set out in it, the Court say:

"In *The Indianapolis & Cincinnati R. R. Co. v. McClure*, 26 Ind., 370, where the action was for killing stock, a quotation is made from *Redfield on Railways*, an author whose language it were well always to carefully weigh, stating that this willingness to injure is always to be attributed to the defendant, if he might have avoided injuring the plaintiff, notwithstanding his own negligence. The decision, however, was an express contradiction of this rule; for it is admitted that the company, in that case, were guilty of carelessness in running their train at too great speed, and yet they were held not liable. The reporter inadvertently carried into the syllabus this erroneous statement of the law, the use of which was simply incidental and not material to the decision. Such a doctrine would require the exercise of the highest degree of diligence on the part of the defendant to protect the plaintiff from the consequences of his own negligence."

In the case of *Pittsburgh, etc., Co. v. Vining's, Adm'r*, 27 Ind., 513, an action was brought by the administrator of an infant of seven years of age, which was run over and killed by appellant's cars at a public crossing or highway over the railway track.

It was alleged that the infant was casually upon the railway track, without the fault or neglect of his parents.

The complaint, among other things, alleged, that while the child was upon the track "at said public crossing, as aforesaid, he could be distinguished by the agents and servants of said defendant, then running said locomotive and train, for a distance of more than half a mile from said crossing, within which distance said locomotive and train could have been stopped, yet the defendant wrongfully, negligently and carelessly, without giving any warning, or in any way attempting to stop said train, and while said child might have been, and was, seen by the defendant's servants then running said

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locomotive and train, ran the said locomotive and train against and over the said child," etc.

To this complaint a demurrer was filed.

The court say, on page 516 :

"It seems to us that the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years, is in itself an act of negligence on the part of the parent sufficient to defeat a recovery, unless the injury be willful. The demurrer assigning for cause the insufficiency of the facts stated in the complaint was, we think, properly overruled, the complaint expressly denying such neglect."

The draftsman of the complaint recognized the fact, that the presence of the child upon the track, unexplained, was negligence, and that there could be no recovery unless he showed that he was seen upon the track by the employes of the company in time to have checked the train and saved it, and omitted to do so.

And the court take the same view of the case, and hold, that in such case the omission of duty on the part of the company must be of the character mentioned in the complaint.

With this complaint and ruling before them, the court say, on overruling the petition for a rehearing on page 519 :

"In overruling the petition for a rehearing, we regard it as proper to state, that upon the original consideration of the case, a majority of the court were of opinion that the judgment should be reversed upon the additional ground that the finding was not sustained by the evidence. In deference to a doubt then expressed by one of the judges, the reversal was placed in the opinion upon the sole ground on which we stood together. A fuller consideration has satisfied us all that the child, for whose death the action was brought, was unnecessarily exposed by his parents to the danger which caused his death, and against which his judgment was too immature to afford him protection, under such circumstances, to sustain the action, the evidence must have shown such recklessness on the part of the appellant, as would imply a willingness to inflict the injury. This, the proof did not establish."

This principle is also decided in the case of *The Lafayette, etc., Co. v. Huffman*, 29 Ind., 287.

In the case of the *Evansville, etc., Co., v. Hiatt*, 17 Ind., 102, which was an injury to a person walking upon the track, it was held, that it was negligence to be there, and the rule of liability is stated by the Court:

"It is time that the public should begin to be aware that a railroad track is not a highway for general travel. As the injured party, then, was in fault, in continuing so long upon the track, if not, indeed, in going upon it at all, under the circumstances, and the railroad operatives, after they discovered the condition of the persons, were guilty of no neglect in trying to

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avoid the collision, the plaintiff can not recover. *Wright v. Brown*, 4 Ind., 95; *Wright v. Gaff*, 6 Ind., 416; *The Pittsburgh, etc., Railroad Co. v. Karna*, 18 Ind., 87; *The Indiana, etc., Railroad Co. v. Hudson, Id.*, 825; *The Evansville, etc., Co. v. Lowdermilk*, 15 Ind., 120. It seems that where a plaintiff is in fault, but that the defendants are aware of it in time to avoid injuring him by reasonable diligence, their want of diligence is held to be, alone, the proximate, the immediate cause of the injury."

Mr. Redfield, in the first volume of his work on railways, §188, chapter, 5, sub-section 4, states:

"If the wrong on the part of the defendant is so wanton and gross as to imply a willingness to inflict the injury, plaintiff may recover, notwithstanding his own ordinary neglect. And this is always to be attributed to defendant, if he might have avoided injuring plaintiff, notwithstanding his own negligence."

In this, no means is given a court or jury, of ascertaining what kind of act or omission, on the part of a defendant, passes beyond that negligence that authorizes a recovery where the plaintiff has not contributed to his injury, and becomes "so wanton, and gross" as to authorize a recovery notwithstanding the negligence of the plaintiff.

Is it proper to give the jury this in charge, as the law, in every case where negligence is shown on the part of defendant?

If it is, all negligence becomes of this "wanton and gross" character.

For no principle is furnished, enabling a court or jury to apply it to the proper case, and a jury will apply it to every case. No rule can be said to be good law, that is not capable of a reasonably practical application. It can not be proper to leave this question to the unguided discretion of a jury; it might as well be submitted to a mob. If it is not to be given in charge in all cases, then it can not be given at all, because we have no means of ascertaining the character of a case in which it should be given.

Mr. Redfield says, the defendant is to be held responsible as for this character of negligence in all cases where it "might have avoided injuring plaintiff." Now, in every case of injury, the defendant might avoid injuring the plaintiff. To accomplish this, the defendant has only to do, or omit to do, the act; the omission to do, or the doing of which, causes the injury.

The writer evidently did not, we suppose, intend to apply this rule to all cases of injury by negligence.

In the very qualification he makes, is it not implied that the defendant knew of the danger that the plaintiff was exposed to, and seeing his peril, omitted to use the means necessary to his protection, when in its power to do so?

The word *wanton* is evidently used by *Mr. Redfield* in the sense of *wilful*

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and, taken in connection with the qualification before referred to, would free his proposition from objection.

He cites as authority for the proposition quoted *Wynn v. Allard*, 5 *Watts & Serg't*, 524, and *Kerwaker v. The Cleveland, etc., Co.*, 8 *Ohio St.*, 172.

In the case of *Wynn v. Allard*, the plaintiff was walking in the middle of one of the most frequented streets in the town of *Wilkesbarre*, where there were sidewalks for footmen, when the defendant, in driving his horses in a sleigh rapidly along, ran against him, and injured him.

The court below instructed the jury, that if the injury done to the plaintiff was in consequence of the negligence of the defendant alone, he was entitled to recover damages, but if it was occasioned partly by the negligence, and carelessness of both parties, the plaintiff was not entitled to recover.

The court say:

"The direction was right."

Also, "that a person who leaves the ordinary side of the road is bound to use more care and diligence, and to keep a better lookout to avoid collision than would be requisite if he were to confine himself to the proper side. It was for the jury; therefore, to say, under all the circumstances, whether the plaintiff was chargeable with negligence, having left the sidewalk, is not looking behind, as well as before, to avoid contact with persons riding, or driving in the middle of the street. If he was, the defendant would be answerable only for negligence, so wanton, and gross, as to be evidence of voluntary injury."

This case concedes, that in the street the plaintiff was bound to more care and diligence than would be required upon the sidewalk, but submits to a jury the question, whether there was negligence on the part of the plaintiff to omit looking behind, as well as before, to avoid injury.

This is inconsistent with all the modern cases upon the subject, in *Pennsylvania* and elsewhere.

The rule is, to assume as a matter of law, that such omission is negligent preventing a recovery.

In *Cotton v. Wood*, 8 *C. B.*, (*N. S.*) 568, and *Barker v. Savage*, 45 *N. Y.*, 191, this was expressly ruled.

There are no facts stated in the opinion, to which the portion of the opinion relating to wanton, and gross negligence could apply, so that the character of case to which it would apply can not be ascertained, and we are compelled to look to other cases to see what the judicial understanding of it is.

In *New Jersey Express Co. v. Nichols*, 4 *Vroom.*, 434-439, it is said:

"But if the plaintiff's negligence is established, the comparative degree of negligence of the parties is immaterial, for that it is impossible to say that, without such fault on his part, the occurrence would have happened. The injury must be attributable to the defendant's negligence, and to the

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alone; if occasioned in any degree by the plaintiff's own negligence, he is without redress."

* * * * *

"Unless the act of the defendant amounted to wilful trespass or intentional wrong. (*Brownell v. Flagler*, 5 Hill, 582; *Wynn v. Allard*, 5 W. & S., 524; *Vandegrift v. Rediken*, 2 Zab., 185-189.")

This case shows what the Supreme Court of *New Jersey* understood to be the meaning of the language used in *Wynn v. Allard*.

In the case of *Kerohaker v. The Cleveland, etc., Co.*, it is assumed that the employes of the company saw the hogs of the plaintiff upon the track, and were aware of their danger, and could have avoided injuring them by checking the train, and failed to do so. It was also held, that under the *Ohio* law, a person was not required to confine his stock, and that there was no negligence on the part of the plaintiff in permitting them to run at large. The point involved in the case is stated by the Court on page 199:

"The Court of Common Pleas, however, in this case, refused, upon request, to charge the jury that the agents of the defendant were held to the exercise of ordinary care and caution, to avoid injury to the plaintiff's property thus upon the railroad, but on the contrary, charged that the hogs being unlawfully on the road, the defendant's agents were not required to check the speed of the train, and avoid injury to the animals, even if they could easily and readily have done so."

In this connection we refer also to the case of *The Northern Central Railway Co. v. The State*, 81 Md. 357.

The Court say, on page 366:

"But it is true that, in some cases, there may be negligence in both parties concerned, and yet an action may be maintained; but in such cases, it must appear either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured parties' neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled, and are regarded as equally proximate to the effect produced, and are therefore not susceptible of apportionment."

Where there is negligence upon the part of the plaintiff, he can only recover, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injury to him.

(*Shearman & Redfield on Negligence*, 2 edition, §§ 25, 36, 37. *Harty v. Central, etc., Co.*, 42 N. Y. 468; *Philadelphia, etc., Co. v. Spearen*, 47 Penn. St., 800; *Philadelphia, etc., Co. v. Hummel*, 44 Penn. St., 375; *New Jersey Express Co. v. Nichols*, 4 Vroom, 434, 439; *Northern Central Railway Co. v. The State*, 81

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Id., 357, 366; *Murphy v. Dean*, 101 *Mass.*, 455, 463; *Finleyson v. The Chicago, etc., Co.*, 1 *Dillon, C. C. R.*, 579; *Herring v. Wilmington, etc., Co.*, 10 *Ired. (Law)* 402; *Pool v. North Carolina, etc., Co.*, 8 *Ired. (Law)* 340; *Felder v. Railway Co.*, 2 *McMullen*, 403; *Richardson v. Wilmington, etc., Co.*, 8 *Rich., (Law)* 120; *Sims v. Macon, etc., Co.*, 28 *Ga.*, 93; *Holmes v. The Central Railway Co.*, 37 *Ga.*, 596; *Brownell v. Flagler*, 5 *Hill*, 382.)

It is not sufficient that the defendant's act was the cause of the plaintiff's injury; it must also have been its negligence. Therefore, if the injury to the plaintiff would have occurred, if the defendant had not been negligent in the particulars charged, there can be no recovery.

(*Pittsburgh, etc., Co. v. Kears*, 13 *Ind.*, 87; *Bellefontaine, etc., Co. v. Bailey*, 11 *Ohio St.*, 332.)

The correctness of instructions must be tested by the facts to which the jury are required to apply them.

(*Pond v. Williams*, 1 *Gray*, 630; *Brightman v. Eddy*, 97 *Mass.*, 478; *Merkey v. Mutual, etc., Co.*, 103 *Mass.*, 79.)

Punitive damages can only be recovered in a case of this character where the injury is wilful.

(*Heal v. Glanding*, 42 *Penn. St.*, 493.)

Gordon, Browne & Lamb, and *Barbour, Jacobs & Williams*, for plaintiff.

Baker, Hord & Hendricks, and *David Moss*, (of Noblesville) for defendant.

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IN SPECIAL TERM, 1874

JOHN G. STILTZ v. HENRY TUTEWILER, Treasurer, &c., THE
CITY OF INDIANAPOLIS ET AL.

BANK STOCK—*taxation of.*

Under the act of March 4, 1873, repealing so much of the act of March 15, 1867, exempting shares of stock in banks, from municipal taxation, shares of stock in all the banks of this State are taxable for municipal purposes by the authorities of incorporated towns, and cities of the State.

The act of Congress, approved Feb. 10, 1868, places but one limitation on the taxing power of the State, namely, that the shares of stock in national banks shall not be taxed, at a greater rate, than is assessed upon other moneyed capital in the hands of individual citizens of such State.

McDonald & Butler, for plaintiff.

Elliott, Hanna & Knefler, for defendant.

NEWCOMB, J.—Complaint for an injunction against the collection of taxes levied by the Common Council of the city of Indianapolis, for the year 1873, on certain shares of stock in the First National Bank of said city, owned by the plaintiff.

The tax was levied in conformity with the act of the General Assembly of March 4th, 1873, acts of 1873, regular session, p. 214, and is valid if the act itself is valid. The ground of the plaintiff's claim for relief is, that by the 15th section of the charter of the Bank of the State of Indiana, of March 3, 1855, the State exempted the capital stock of said bank from taxation for municipal purposes; that said bank with

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its branches still remains an organized bank, with its capital stock and all its rights, privileges, and franchises in full force, and that its branches at Indianapolis, Rushville, Madison, Jeffersonville, Terre Haute, Muncie, Laporte, and Logansport, continue to hold, and exercise their rights, privileges and franchises under said charter; that the act of Congress authorizing the taxation by State authority of the shares of stock in National Banks, provides that the tax so imposed under the laws of the States should not exceed the rate imposed upon the shares of any of the banks organized under the laws of the State; and that inasmuch as the State cannot authorize municipal corporations to tax the capital stock of the Bank of the State, the shares of stock in National banks are exempt from such taxation.

The city, and her treasurer demur to the complaint.

The 15th section of the charter of the Bank of the State is as follows :

“ The capital stock of said bank shall be subject to the same rate of taxation for State and County purposes, as the stock, or property of other moneyed corporations; and the real estate and other property of said bank and branches, situated in any city or town, shall be taxable for municipal purposes in the same manner as other property so situated, but the capital stock of said bank, or branches, shall not be taxable for municipal purposes.” 1 G. & H. 142. This exemption has been held to be constitutional by the Supreme Court. *The Bank of the State v. The City of New Albany*, 11 Ind., 139; *The President, etc., of the town of Connersville v. The Bank of the State of Indiana*, 16 Ind., 105. The 41st section of the National Banking Act, approved June 3d, 1864, is as follows :

“ That nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person, or body corporate, from being included in the valuation of the

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personal property of such person, or corporation in the assessment of taxes imposed by, or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided, further*, That the taxes so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State, where such association is located; *provided, also*, that nothing in this act shall exempt the real estate of such association from either State, County, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

By the act of March 9, 1861, 1 G. & H. sup. 17, taxes were assessed against the banks in this State on their capital stock, and no tax on account of such stock was levied on the individual stockholders. This system of bank taxation continued until the taking effect of the act of March 15, 1867, which provided for taxing the *shares of stock* in *all* banks in this State, whether National or local, for all except municipal purposes. 3 *Ind., Statutes*, 33.

Until the taking effect of this act, there was no law of the State for the collection of taxes on National Bank stock, and stockholders therein escaped taxation on that species of property. *Wright, Auditor, &c., v. Stilts*, 27 *Ind.*, 338. The act of March 4, 1873, repealed the clause of the act of 1867, exempting shares of stock in banks from municipal taxation, and expressly provides, that such shares shall be taxable by the authorities of incorporated towns and cities of this State.

In the view I take of this case, it is unnecessary to inquire whether the act of 1873 can be enforced against the shares of stock of the remnant of the branches of the Bank of the State, as I think the question of the liability of the shares

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of stock of other banks to municipal taxation does not depend on the solution of that question.

The Supreme Court of the United States, in the case of *Lionburger v. Rouse*, 9 *Wallace*, 468, announced a rule of interpretation, that seems to me fatal to the claim of the plaintiff in this action. The facts, in brief, were these: In the year 1857, there were ten banks of issue established in the State of Missouri, whose charter restricted taxation to one per cent. on the capital stock paid in, &c. Eight of those banks elected to organize as National Banks, while the others continued to do business under the charter granted by the State. By the general revenue law of Missouri, of February 4, 1864, shares of stock in banks, and other incorporated companies, were made subject to assessment as other property. Under this act, according to the statement of the case in 9th *Wallace*, "a tax of nearly two per cent. was levied by the State on the shares of one Lionburger, a resident of St. Louis, and a shareholder in the Third National Bank of St. Louis. Payment of the tax being refused, the collector, a certain Rouse, collected it forcibly. Lionburger, thereupon, brought suit against him in one of the State courts for the alleged wrongful act, asserting that the proviso in the 41st section of the act of 1864, imposing a limitation on the power of the States, had reference to banks of issue alone; that the State had disabled itself by its contract with them to tax that sort of bank, otherwise than it had contracted for, (one per cent.), and that the assessment and collection, if made under color of law, were without any legal authority whatever. It was not denied that the two State banks of issue held a very inconsiderable portion of the banking capital of the State, and that the shares of all other associations in the State, (of which there were many, some created after 1857, and some before) with all the privileges of banking, except the power to emit bills, were taxed like the shares in National banks."

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The decision of the Supreme Court of Missouri was adverse to Lionburger, and he appealed to the Supreme Court of the United States. The latter court unanimously affirmed the decision of the State court. I copy a portion of the opinion delivered by Justice Davis in that case. "It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would restrain them from legislating adversely to the interests of National banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals, or corporations, could grant away the right of taxation, and that this power has been frequently exercised. It was equally within the knowledge of Congress, that the policy on this subject varied in different States; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious, or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law, which by another it made practically unavailable? If the construction contended for, by the plaintiff in error, be allowed, then the State, so unfortunate as to have a single bank whose shareholders are exempt, by contract, from taxation in the manner provided for by Congress, can derive no benefit from the power given to tax the shares of National banks. And this further

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consequence will follow, that the shareholders of National banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality, would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of any express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the 41st section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

Testing the case in hand by this rule, it is apparent that the tax complained of was properly assessed and collected. Missouri has complied, so far as it had the ability to do it, with the demands of the law."

The only distinction between the Missouri case, and the present, is, that it does not appear by the pleadings, that there are any other banks existing in this State, having shares of capital stock, other than the remaining branches of the Bank of the State. It may be there are none, and the complaint avers that there are none to the plaintiff's knowledge; but on the reasoning in the case of *Lionburger v. Rouse*, it is difficult to see that it can make any difference in the principle there asserted. The statutes of the State provide for other banks of issue, by the free banking law of 1855, and for banks of discount, and deposit, by the act of February 7, 1873; and on the shares of stock of all banks the law fixes the same rate of taxation; so in every respect this State has brought her revenue laws within the principles laid down by the Supreme Court of the United States. The fact is notorious that the few remaining branches of the Bank of the State

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“hold a very inconsiderable portion of the banking capital of the State,” and that they long since ceased to perform the functions of banks of issue.

I have thus far discussed this case on the supposition that the 41st section of the National Banking Act is still in force, but the proviso on which this action is based, seems to have been repealed by a subsequent act of Congress. Indeed, it is said in the case of *Lionburger v. Rouse, supra*, “that the changed condition of the banking interests of the country has been the occasion of further legislation by Congress on this subject, and that *now* the power of State taxation over the shares of National banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.”

The legislation here referred to is an act of Congress, approved February 10, 1868, entitled, “An Act in relation to Taxing Shares in National Banks.” The following is the full text of the Act:

“*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the words ‘place where the bank is located, and not elsewhere,’ in Section 41 of the Act to Provide a National Currency, approved June 3d, 1864, shall be construed and held to mean the State within which the bank is located, and the legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; and *provided, always*, that the shares of any National bank, owned by non-residents of any State, shall be taxed in the city or town where such bank is located, and not elsewhere.” 15 *U. S. Statutes-at-Large*, 34.

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This act places but one limitation on the taxing power of the States, namely: that the shares of stock in National banks shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of *individual citizens* of such State."

It is not charged in the complaint that the tax on the plaintiff's bank stock exceeds the rate so limited.

The act of March 4, 1873, took effect from its passage, and authorized the assessment of the taxes complained of for the current year, *De Pauw v. The City of New Albany*, 22, *Ind.*, 204.

The demurrer to the complaint is sustained.

This opinion was affirmed in General Term, as rendered by Judge Newcomb, and affirmed in Supreme Court, November Term, 1874.—REPORTER.

IN GENERAL TERM, 1874.

ADAM BAUER v. JOHN B. STUMPH AND HERMAN BISHBINGHOFF,
Appellants.

SALE—

CONVERSION.

A purchased from B three casks of wine, but it being of an inferior quality, and not such as represented by B, A refused to receive it, and so notified B. Finally A took the wine from the railroad station, and stored it in his cellar separate from his other stock, subject to B's order, and again notified B that the wine was there subject to his order,

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Held: That by B's acquiescence in A's refusal to receive the wine, and a subsequent demand therefor by B, left the right of possession in him, and a title to the property until conversion.

A conversion by one partner, in the ordinary course of business, and for the benefit of the firm, of property under, and subject to their joint control or custody, renders both liable for the proceeds, regardless of the fact that any other member was ignorant of such conversion.

D. K. Elliott, for appellants.

Klingensmith, for appellee.

NEWCOMB, J.—This was a suit against the appellants and Herman Rickoff and wife for the alleged tortious conversion of three casks of wine, the property of the plaintiff.

In the year 1866, one Anselm Frank was a wholesale liquor dealer in the city of Indianapolis, and ordered the wine in controversy from the plaintiff, who was a dealer in wines, in Sandusky, Ohio.

On the arrival of the wine, Frank wrote to Bauer, notifying him that he would not accept it on account of its inferior quality.

Several letters passed between the parties, one of which is not in the bill of exceptions, though it was given in evidence. The result was that Frank took the wine from the railroad depot, and stored it in his cellar, subject to the order of Bauer.

On February 5th, Frank wrote to Bauer, offering to take and pay for the wine at a reduced price. To this letter no reply was made. In August, 1867, Frank died, the wine in its original casks still being in his cellar. On December 6, 1867, Bauer addressed a letter to Frank, which was not in evidence. This letter was replied to by the defendant, Stumph, as the friend and adviser of Mrs. Frank, the widow.

After advising Bauer of Frank's death, the writer says: "Upon his death bed he had me called to him, and made me acquainted with his books and business, to enable me to give his wife the needed assistance to close out the busi-

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ness, to collect outstanding accounts and notes, and pay his debts, for which purpose he had appointed me last spring, in his last will. Among the debts he pointed out your account, and said that it was unjust, that the wine was not of the quality you had by letter assured him; that he had at first refused to receive it, and that the railroad company had placed the wine in store, and only at your request to do the best with it, he had at last received the same, and that he owed you the sum of \$261.25, as an entry on the book made by Mr. Frank himself shows. This sum is at your disposal. Should this be satisfactory to you, you can sign enclosed receipt, and collect by express."

If a reply to this letter was sent, it is not in evidence.

The defendant, Bishbingshoff, had long been a clerk of Frank, and a few weeks after the death of the latter, he and his co-defendant, Stumph, purchased of Frank's widow the stock in trade of the deceased. This wine was then in the cellar where Frank had placed it, but it was not included in the invoice or sale, but it passed into the possession of the purchasers with the building, and stock in trade. Afterward, and during the partnership of Stumph & Bishbingshoff, the wine disappeared.

Frank's widow married Herman Rickoff, and they were made defendants with the appellants.

The cause was tried at Special Term by the Court, a jury being waived. There was a finding for the defendants Rickoff, but against Stumph & Bishbingshoff for \$170, less than half the price at which the wine was shipped to Frank. A motion for a new trial was overruled.

The supposed errors presented by the appellants are :

1. That a certain entry in Frank's books was admitted in evidence over their objection. The substance of the entry was a statement of the quantity of wine received from Bauer, with a memorandum, that it was not according to contract, and therefore would not be posted without an understanding.

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The bill of exceptions states that this was admitted to prove the value of the wine. It was not admissible for that purpose, but as the value was proved by other unobjectionable evidence, and as the finding shows that the value, as stated in this entry, was not regarded by the Court, no injury was done to appellants by its admission.

2. It is next urged that the sale to Frank was complete when the wine was shipped by plaintiff at Sandusky; that the right of property therein then passed to Frank, and that the plaintiff's cause of action is against Frank's estate, if he has any.

It is not necessary to inquire what Bauer's legal rights as against Frank were, if he had chosen to assert them. The proof is that Frank refused to accept the wine, unless Bauer would consent to a reduction in price, which the latter never consented to do. From the time it came to his possession to the day of his death, Frank kept these casks of wine separate from his own stock, and they passed into the custody of the appellants as the property of Bauer. Bishbingshoff, in his testimony, states that when he and Stumph purchased the stock left by Frank, this wine was not invoiced, for the reason that they did not consider that it belonged to Frank's estate, "but to Mr. Bauer, of Ohio," "and we passed it," he says, "and left it in the cellar."

Before suit, the plaintiff demanded the wine of the defendants.

We think these facts justify the finding that the plaintiff acquiesced in Frank's refusal to receive the wine, and that it remained his property until disposed of by the appellants.

3. It is next claimed that while the wine remained in the cellar of these defendants they were mere gratuitous bailees, and not liable without proof of an actual conversion by them. Unfortunately for this proposition, there is such proof. Bishbingshoff testified on this point as follows: "The wine could not have got out of the cellar without my know-

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ing it; and after we were in business a while it slipped my mind that the wine was Mr. Bauer's, and not thinking that there was any wine there that did not belong to us, it was used in the firm of Stumph & Bishbingshoff." The evidence does not show that Stumph knew of the conversion of the wine, but the act being done in the ordinary course of the partnership business, and for the benefit of the firm, both are liable. *Story on Partnership*, §§ 166, 168.

4. The next point made by appellant's counsel is, that plaintiff parted with his title and possession in 1866; that his cause of action then accrued, and that the finding should have been for the defendants on their answer of the statute of limitations. This conclusion would follow if the premises were sound; but, as we have seen, the title was in the plaintiff until the conversion by the defendants, which was long after 1866, and the right of possession was in him whenever he chose to exercise it.

6. Lastly, it is urged that the wine was of no value, and therefore the damages found were excessive. All the defendants, except Stumph, swore that it was worthless, but the plaintiff testified that it was good, and worth \$1.50 per gallon, when shipped to Frank. And it so far improved in quality after going into possession of the defendants, that they unconsciously sold it for good wine; and it does not appear that a single customer made complaint to them that it was not good.

The evidence as to value being contradictory, it was for the judge trying the cause to determine the weight, and credibility due to each witness, and his conclusions on that point cannot be reviewed here. We may remark, however, that we think, if he erred at all, it was in not giving larger damages.

The judgment at Special Term is affirmed, at the cost of the appellants.

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IN GENERAL TERM, 1874.

DAVID DAVID ET AL V. LEWIS KESSLER ET AL., Appellants.

DEFAULT—*application to set aside.*

An application to set aside a default, must particularly set forth the grounds of defense; a mere general denial is not sufficient.

Finch & Finch, for appellants.

Smith & Hawkins, appellee.

PERKINS, J.—Application to set aside a default. Application denied. Appeal to General Term. The suit was commenced June 17, 1873. The default was taken on the second day of the September Term, 1873. The decree quieting title to lands, as prayed in the complaint, and judgment for costs, were entered on the following day.

On the 30th of said month of September, the defendants' attorneys filed a motion to set aside the decree and default, and between that day and the eighth of October following, filed, in support of their motion, the affidavits of Fabius M. Finch, John A. Finch, and Henry Fisher, and the certificate of Dr. Cominger, and offered to file the general denial in answer to the complaint.

We copy the affidavit and certificate mentioned :

"John A. Finch upon oath says that he is a member of the law firm of Finch & Finch, and that he has not been in the State of Indiana from the 8th of July, 1873, until the

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27th day of September, 1873, having been absent during that time going to, and returning from Europe; that at the time he left Indiana, Fabius M. Finch, the senior member of the firm, was attending to business in ordinary health, and expecting to attend to the business of the firm until affiant should return. He further says that he believes the defendants have a full and complete defense to the complaint in the general denial."

"Henry Fisher, upon oath says, that he is one of the defendants in the above entitled cause, and fully informed of the merits of the case, and for himself, and his co-defendants, he specially denies every allegation of fraud, or fraudulent collusion between himself, and any of his co-defendants, or between either of them, alleged in the complaint of plaintiff. He says that he, and his co-defendants, collectively, and severally, have a complete defense to the complaint in the general denial, which is hereby tendered.

He says, that he, and his firm employed the firm of Finch & Finch to defend the action; that they were prevented from appearing in court on the day, and for several weeks succeeding the day the default was taken, by the serious sickness of the senior member of the firm of which neither he, nor either of his co-defendants had information; that the junior member of the firm was absent from the state at the time, and for several weeks succeeding the day the default was taken; he prays the default may be set aside," etc.

"I, John A. Comingor, a practicing physician of this city, certify that Fabius M. Finch was under my charge during the month of September of this year for treatment of an aggravated carbuncle which confined him to his house, and had, from the 2nd day of September, for several weeks. On the 2d, and for a week thereafter, he could not possibly have attended to business or left the house."

"Fabius M. Finch, upon oath says, that he is a member

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of the firm of Finch & Finch, attorneys for defendant in the above entitled cause, and the only member in the city during the months of August, and September, until the 27th inst., when the junior member returned to the city. Affiant says that about the 22d day of August he was taken with an illness, the nature of which did not appear for a week, or longer; that two, or three days after he became unwell, and before he was confined to his house, one of plaintiff's attorneys, Mr. Hawkins, called at the office of affiant, and inquired if the firm was employed to defend this suit, and desired to know the nature of the defense. Affiant informed Mr. H. that the firm would defend, but that as he had not been able to examine the case, and not being then well enough to attend to such business, he could not give the defense. On the next day or two afterward, Mr. Smith, another of plaintiff's attorney's called, and had the same information. Affiant further says, that all the defendants live at a distance from the city, and knew nothing of his illness, and wholly relied on his being present in Court when the case was called to appear, and defend for them. Affiant further says, that from the day he spoke to Mr. Smith, his illness so increased as to ultimately incapacitate him from business, confining him to his house, and assuming a very painful, and dangerous condition which continued for nearly four weeks. He says that the default herein was taken on the first day of the call of the docket, on the second day of the term; that he was at that time, and for several days previous confined to his bed, and wholly unable to attend to, or converse upon business, or to send for, and employ any attorney to appear for his firm in the case; and that the default was then taken without his knowledge, or ability to prevent it, if he had thought plaintiff's attorneys would take such a course. He says, that knowing that plaintiff's attorneys each knew of the employment of the firm, and knowing that each knew of his illness, and of

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the absence of his partner in business, he relied on the usual courtesy of members of the bar in such cases, and trusted that the case would be delayed until his associate counsel would return to the city, or until he was able to appear in court. Affiant further says, that from his knowledge of the case, he thinks defendants have a full, and complete defense to the action."

On this showing, we think:

1. The defendants were negligent in failing to communicate to counsel their defense, if they had any, till long after the suit had terminated.

2. Counsel did not ask plaintiff's attorneys to delay taking steps in the cause, at the opening of the term.

3. We think the general denial of the cause of action is not, in this case, such a setting forth of the grounds of defense as is required on an application to set aside the default. We can conceive of cases where it might be. But in this case, which is an action to quiet title to real estate, and wherein, as appears from the copies of deeds, judgment, and agreement, set out in the complaint, there is considerable complication, and in which action, according to *Sherman v. Gaines*, 15 Ind., 931, affirmative as well as negative defenses may be given, we think, on an application to set aside a default, the defendants' defense should be particularly set forth.

We think the complaint good on general denial, the aspect in which, on this application, we must look at it.

Judgment is affirmed.

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IN GENERAL TERM, 1874.

RICHARD J. BRIGHT, Appellant, v. JOHN M. LORD ET AL.

Stock—owner of, when entitled to dividend on shares of.

On the 14th day of June, 1873, A agreed, at a stipulated price, to sell B 520 shares, of fifty dollars each, of the capital stock of the Indianapolis Rolling Mill Company, at B's option, to be taken by him at any time on, or before the 14th day of July, 1873. B paid \$100 for the option. Before the expiration of the time, on the 14th day of July, 1873, the purchase money was paid, and the certificates of stock assigned to B.

On the 3d day of July, 1873, the Board of Directors of the I. R. M. Co., declared a dividend on the par value of the capital stock, payable on the 1st day of August ensuing. B claimed the dividend on the shares of his purchase, and sued for their recovery.

Held: To entitle the share holder to dividends, he must be the owner of the shares at the time the dividend is declared.

It is immaterial when the dividend is payable, it is still a debt to the owner of the shares at the time it is declared, and set apart, and does not pass with a transfer of the shares before the debt becomes due. In selling the shares, he does not sell the debt.

After a dividend is declared, the profits constituting the dividend are separate from, and do not pass with the stock.

McDonald & Butler, for appellant.

BLAIR, J.—The complaint in this case may be briefly stated as follows: On the 14th day of June, 1873, the defendant, Lord, and the plaintiff made a contract by which said defendants agreed to sell the plaintiff five hundred and twenty shares of the capital stock of the Indianapolis Rolling Mill Company, of fifty dollars, at an agreed price of

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thirteen thousand dollars, "at the option of the plaintiff to be by him taken at any time on, or before the 14th day of July, 1873." The plaintiff paid the defendants one hundred dollars for the thirty days option. Before the expiration of the time, to wit, on the 14th day of July, the purchase money was paid, and the certificates of stock assigned to the plaintiff. The plaintiff avers that he purchased the stock without a reservation of any dividends, or earnings, and that while he had the right under the contract to become the purchaser of the stock, to wit, on the 3d day of July, 1873, the Board of Directors declared a dividend of five per centum on the par value of the capital stock, to be paid on the first day of August, 1873. It is then alleged that the corporation refuses to pay the same to the plaintiff, and threatens to pay it to the defendant, Lord.

A demurrer was overruled to the complaint, and an answer filed in general denial.

A trial of the cause at Special Term resulted in a judgment for the defendants. After a motion for a new trial was overruled, and the proper exception entered, the plaintiff appealed to General Term.

The only error assigned is the overruling of the motion for a new trial. The reasons embraced in the motion are, that the finding of the court is contrary to the evidence, and that the finding is contrary to law.

The evidence is in the record, and sustains in every essential particular the allegations of the complaint. During the negotiations nothing was said between the plaintiff, and defendant, Lord, about dividends. The plaintiff paid them one hundred dollars for the option given him to take the stock at the price fixed, at any time between the 14th day of June, and the 14th day of July, 1873. On the 2d day of July, 1873, the Board of Directors of the Rolling Mill Company were in session, it being their regular quarterly

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session, and a report being made by the Secretary, showing the business of the corporation for the past year, on motion of John M. Lord, one of the defendants, and also a Director in the corporation, a dividend of five per cent. was declared, payable on the first day of August, 1873.

The question presented is this : to whom does this dividend belong ?

The plaintiff claims that the contract of the parties must be construed to be this : that in consideration of the one hundred dollars paid by the plaintiff, he was to have the stock whenever he chose during the time specified, with all its incidents, and earnings in the same condition as it was on the day he paid his money ; that is, on the 14th day of June ; in other words, the plaintiff claims that when he accepted the offer on the 14th day of July, it related back to the time of the offer in June, and entitled him to all the property, and values represented by the stock at that time. In the second place, he claims that as he bought, and paid for the stock, and it was assigned to him before the dividend was payable, he is entitled to recover it.

We understand the contract to be, that the plaintiff had the privilege of taking the stock at any time from the making of the contract to the 14th day of July. He was under no obligation to take it. He had made no contract by which he could be compelled to take it. It rested entirely with himself whether he would ever become the owner of the stock. He had merely bought the option to take, or not, within the time specified.

There is no charge, or intimation of fraud on the part of the defendants, nor was there any express contract with reference to the earnings, or dividends. There was no contract, or warranty that the value of the stock should not be depreciated. Shares of stock do not represent a specific interest in lands, or goods and merchandise, or money held

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by a corporation. The owner of shares acquires certain rights in reference to the management of the corporate business, and the right to receive dividends declared on such stock. To entitle the shareholder to dividends he must be the owner of the shares at the time the dividend is declared.

Jones v. The Terre Haute & Richmond R. R. Co., 29 *Barbour*, 353; *March v. The Eastern R. R. Co.*, 43 *N. H.*, 515; *Dow v. Gould and Curry Silver Mining Company*, 31 *Cal.*, 629. After a dividend is declared the profits constituting the dividend are separated from the stock, and do not pass with the stock. *Phelps v. The Farmers' and Mechanics' Bank*, 26 *Conn.*, 269.

It follows from this, that after a dividend is declared it becomes a debt from the corporation to the owner of the shares at the time the dividend is declared. This is expressly decided in the case of *King et al. v. The Patterson & Hudson River R. R. Co.*, 5 *Dutcher*, 505.

It makes no difference that the dividend is payable at a future day; in such case it is still a debt from the corporation to the owner of the shares at the time it is declared and set apart, and does not pass with a transfer of the shares before the debt becomes due. In selling the shares he does not sell the debt.

We are of opinion that until the plaintiff decided to take the stock, and completed his purchase on the 14th day of July, 1873, the defendants, Lord, were the owners of the stock, and the dividend declared on the 2d day of July, became on that day a debt to the said defendants from the corporation, and that they were entitled to receive it when it became due, and payable on the 1st day of August.

The judgment of the Court at Special Term is, therefore, affirmed.

McFadden v. Benson.

IN GENERAL TERM, 1874.

JAMES B. McFADDEN v. DAVID S. BENSON, Appellant.

WITNESS—*opinion of, as evidence—*DEPOSITIONS—*notice to take—*CONTINUANCE—*affidavit for.*

Upon an examination of a witness as to the probable age of a defendant at a former trial, an opinion formed from the physical appearance of the defendant, whether at the time in question he was over, or under twenty-one years of age, is admissible as evidence. The facts stated by the witness, and the opinion formed by him on those facts, are proper matters to be considered, and their effect upon the question at issue is for the Court to determine.

A motion for continuance, supported by an affidavit fulfilling in all formal parts the statutory requirement, is yet insufficient where it fails in other essentials, as in a notice to a distant notary to take depositions, it should show that interrogatories were sent to be propounded to witnesses, or that some other steps had been taken for directing the examination of witnesses to the subject matter in issue, and that he had provided for the fees of the officer before whom they were to be taken, and the officers serving process, else show that he expected their services without compensation. The affidavit should also show proper diligence as to time.

D. V. Burns, for appellant.*B. F. Davis*, for appellee.

NEWCOMB, J.—This suit was commenced before a Justice of the Peace, on a promissory note made by Benson and payable to McFadden. No special answers were filed. On appeal to the Superior Court, the cause was tried upon the

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complaint filed before the justice. At the trial the defendant undertook to prove that he was under twenty-one years of age when he executed the note, and evidence was introduced by the plaintiff, tending to prove that the defendant was over that age at that time.

The plaintiff also introduced evidence tending to show a ratification, and partial payment of the note by defendant some years after the latter confessedly became of legal age. The evidence as to the defendant's age when he signed the note, and of his subsequent ratification was conflicting, but there was evidence on both points sufficient to justify the finding of the Court against the defendant; consequently we need not discuss the weight of the conflicting evidence, as that was a question properly belonging to the Judge who tried the cause, and is not subject to review on appeal. Three questions are presented in the record; two relative to the admission of certain testimony, the other on the refusal of the Court to grant the defendant a continuance. The plaintiff assisted in the defense of the defendant on the trial of the latter for a homicide, the character of which is not disclosed in the evidence, in the Shelby Circuit Court, in the year 1861, and the note in suit was given for plaintiff's fee as an attorney in that case. The defendant was convicted and sentenced to the State prison, but was pardoned by the Governor before the sentence could be carried into effect.

On the trial of the present cause, Hon. Thomas A. Hendricks was a witness on behalf the plaintiff, and testified that he defended Benson on the trial, for homicide, and said: "His appearance then was about the same as now, except that his face was fuller. He had a heavy beard at that time.

* * * * My recollection is that he was a mature, well developed man." The witness was then asked this question by the plaintiff: "What, in your opinion, from what you knew of him, and from what you have stated, was the age of the

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defendant at the time of said trial?" To this question defendant's attorney objected, on the ground that it was incompetent, and that the witness had not stated facts sufficient to base an opinion upon. This objection was overruled, and the defendant excepted. The witness answered: "I should judge he was 23 or 24 years of age." The question was propounded to several other witnesses, who knew the defendant at the time of the criminal trial, and they answered substantially the same as Governor Hendricks had, except that some of them judged his age at that time to have been from 24 to 28 years of age. In our judgment there was no error in the admission of this evidence. It was competent for the witness to form an opinion, from the physical appearance of the defendant, whether at the time in question, he was over or under twenty-one years of age. They had testified that he was a full grown, and apparently mature man, with a heavy beard, as heavy as at the time of the trial, when, according to his own statement on the witness stand, he was at least thirty-one years of age.

The facts stated, and the opinions of the witnesses based thereon, were proper matters to be considered; their effect on the question at issue was for the court to determine. *The State v. Kalb*, 14 Ind., 404.

The Court, over the defendant's objection, permitted the plaintiff to prove that on the trial of the criminal prosecution no evidence was offered by the defendant, nor any appeal made to the jury to mitigate the punishment, in case they found him guilty, on the ground that he was under twenty-one years of age at the time of the alleged commission of the offense charged. A statute then, and now in force, contains this provision: "Whenever any person, under the age of twenty-one years, shall be convicted of any crime, the punishment for which is confinement in the State's prison, the jury may substitute imprisonment in the county jail for

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any determinate period." 2 G. & H., 504. This statute gives juries great latitude in fixing the punishment of a minor convicted of crime, both in the nature, and extent of the punishment; and it would seem incredible that the defendant, and the able counsel who defended him, should fail to avail themselves of a fact so important as his minority, if such were the fact. At all events, we think it was a circumstance proper for the Court to consider in this case, in determining the weight due to the defendant's testimony that he was at that time under twenty-one years of age. On the day this cause was tried, September 25th, 1873, and immediately before the trial, the defendant filed his affidavit, and motion for a continuance, which motion was overruled. The affidavit stated that the principal defense upon which the defendant would rely was the fact that he was a minor when he executed the note in suit; that he could prove that fact by his father, and mother who resided in the city of New York; that on the 5th day of September, 1873, he served on plaintiff's attorney a notice to take their depositions at the office of a certain notary public in that city, giving the number, and street; that on September 13th, at the instance of defendant's attorney, the time named in the notice was extended to September 19th, which the parties then thought would give ample time for the depositions to arrive by the 25th, the day set for the trial; that said notice was sent on the 13th to said notary, in ample time for him to summon said witnesses before him on the 19th, but for some reason, wholly unknown to affiant, the depositions have failed to arrive; that he believed said depositions would arrive in a very few days; and that he would have given said notice earlier, but for the fact that he had been expecting his father, and mother to visit him, and thought they would have been here during that term of the Court, when they could be orally examined, &c.

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The formal parts of the affidavit fulfilled the statutory requirements.

There are two good reasons why the application for a continuance was properly overruled. It is not enough that a party sends a notice to a distant notary to take depositions on his behalf. He should show that he sent interrogatories to be propounded to the witnesses, or that some other steps had been taken for directing the examinations of the witnesses to the subject matter in which their testimony was desired; and that he had provided for the fees of the officer before whom the depositions were to be taken, and of the officer serving the necessary subpoena. The defendant did not show that he had any reason to expect the officers to render their services without compensation, nor that he had made any provision to pay them.

The affidavit also fails to show proper diligence as to time, and the remainder of the record makes the case much worse in that respect than the affidavit. There had been one trial of the cause in the Superior Court, in June, 1873, and a finding against the defendant. A new trial was granted him on his affidavit, that he was surprised by the evidence of plaintiff's witnesses, and that he could prove by his father and mother, then residing in the city of New York, that he was born September 16, 1841, and that if a new trial were granted him, he would procure their testimony by the next term of the Court. This affidavit was filed June 24. A new trial was granted on the 29th, and the next term of the Court began on the first Monday of September. The bill of exceptions shows that on the second day of September the case was set down for trial on the 11th; that afterwards, at the request of defendant's attorney, the time was extended to the 22d, and again on his application it was extended to the 25th of September. The only excuse given for this long delay in taking depositions was, that the defendant expected the wit-

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nesses to be present at the trial. That this expectation was disappointed, was his misfortune, but it furnishes no reason for giving him further time to remedy the consequences of his neglect.

The judgment is affirmed, with costs.

IN GENERAL TERM, 1874.

JOHANNA SULLIVAN v. JOHN W. CANAN.

HOUSE-HOLDER—*defined.*

In a proceeding supplemental to execution, to subject certain property to the payment of a judgment, the defendant averred that what he had, had been set off to him as exempt, he being a house-holder. He testified, "the property (furniture) is all I own; it is in the use of myself, and wife, and little daughter; we occupy rooms in the hotel, and have the furniture in the rooms; we take our meals at the hotel table with other guests; I pay my son-in-law no board; I have nothing to pay with."

Upon this statement of facts, the question turned upon the construction of the meaning of the statute exempting property of house-holders from execution, or what constitutes a house-holder. The Court

Held: It is not necessary that the head of the family should own, or rent an entire structure; he may live with his family in a part of a building, in one room of it, and so long as he keeps his family together, as a family, separate, as a little community from others, he is a house-holder, and entitled to the benefit of the exemption act.

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Held: It is not necessary that the family should take their meals in the house in which they reside, nor that rent should be paid for such house, or part thereof, to constitute one a house-holder.

Finch & Finch, for appellant.

PERKINS, J.—Johanna Sullivan obtained a judgment against John W. Canan. Execution was issued upon the judgment, and returned unsatisfied, no property being found subject to execution.

The plaintiff then caused said Canan to be ordered to appear in Court to answer as to his property subject to execution.

The defendant answered the complaint filed for the obtaining of the order above mentioned, giving a schedule of his property, and then answered that it had been set off to him, as exempt from execution, he being a house-holder. The defendant was examined, and on his statement alone, the case was decided, the Court holding him to be a house-holder, and entitled to the property as exempt from execution.

His statement was as follows: "I became indebted to the plaintiff in 1867, or 1868. I am still indebted to him. The judgment mentioned in the complaint is right. I owe it, but cannot pay it. The property I had at the Spencer House has all been sold on execution, except a small amount. It was sold by the Sheriff to Henry Guitig, and sold by him to Col. Gray, my son-in-law. The property in the answer is all the property I own, and is in the Spencer House, except the harness and buggy. It is in the use of myself, and wife, and little daughter. We occupy rooms in the hotel, and have the furniture in the rooms. We take our meals at the hotel table with other guests. I pay my son-in-law (Col. Gray, proprietor of the Spencer House) no board. I have nothing to pay with. I am now in the rail-

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road ticket office at \$50 per month. I have been there but a short time."

The Court below might have found that the defendant, Canan, was in the exclusive occupancy, without limit as to time, of certain rooms at the Spencer House, with his family; that those rooms were furnished by himself, and under his control; and the only question raised in the case is, was he, upon the state of facts presented, a house-holder, within the meaning of the act exempting property of house-holders from execution?

The Statute does not define the term house-holder. It leaves the work of definition to the judicial tribunals, as also the determination of what particular cases come within it; and all the authorities concur in this, that considering the object of the statute, and its scope in application to given cases, should be liberal in favor of those claiming the benefit of the statute. Who, then, within the intent and meaning of the statute, is a house-holder? A house-holder, in one sense of the term, is the owner, or occupier of a house, and a person may be either, and yet not be a house-holder within the meaning of the exemption statute. The provision of the statute was enacted in favor of families. A man's family is called his household, and the head, or master of such family may be called a house-holder. Combining these definitions, a house-holder may, as a general proposition, be said to be the head of a family occupying a house. Now in practical application, what cases do courts hold to be within the definition? It has been decided that the benefit of the statute may be claimed by one who is not occupying a house at the time, but is moving with his family from one house to another. *Mark v. The State*, 15 Ind., 98. And that a man's family may consist of domestics, other than an wife, or wife and child, or children. *Graham v. Crocket*, 18 Ind., 119. Also where one breaks up housekeeping for an

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indefinite period of time, stores his furniture, and, with his family, leaves his place of residence intending, however, to return at some future time, and resume housekeeping, he is to be deemed a householder, within the exemption act, during his absence. *Griffin v. Southerland*, 14 Barb., (N. Y.) 456. But the case at bar falls literally within the definition. Canan had a family in a local habitation, a place of shelter, where "they remained together as a family, without being broken up and incorporated into other families;" *Woodard v. Murry*, 18 John., (N. Y.) 400; and such place may be called their house, home, or residence. It is not necessary that the head of the family should own or rent an entire structure—he may live with his family in a part of a building, in one room of it, and so long as he keeps his family together, as a family, separate, as a little community, from others, he is a house-holder, entitled to the benefit of the exemption act. It is not necessary that the family should take their meals in the house in which they reside, nor that rent should be paid for such house, or part thereof. We think the defendant was a householder.

Judgment affirmed.

Hammons v. Espy, and Vinnedge.

IN GENERAL TERM, 1874.

JOHN L. HAMMONS v. MARGARET F. ESPY AND JOHN C. VINNEDGE, Appellant.

If, in the purchase of real estate, made upon representations of the seller, where the buyer is without knowledge of the correctness of the representations, a material statement is in fact false, and is uttered for the purpose of inducing the buyer to rely upon the statement as true, and he does so rely and act, and is thereby prejudiced, it has the whole effect of fraud in vitiating the contract, though the person uttering the statement, did not know it to be false, but believed it to be true.

One who sells property on his description, must make good, in all things, his statements, and if it be untrue in a material point, he is liable for that variance, though occasioned by a mistake, upon the ground that the party selling property is presumed to know whether the representations he makes are true or false.

Where a complaint has one good paragraph, and there is a general finding and judgment upon the complaint, it will be presumed to be upon the good paragraph.

J. A. Holman, for appellant.

Byfield & Howe, for appellee.

BLAIR, J.—The first paragraph of the complaint alleges, that on the 30th day of January, 1873, the plaintiff was the owner of certain real estate in Bartholomew county, in this State, of the value of two thousand dollars, which was mortgaged to secure the payment of three hundred dollars, and at the same date the defendant, Margaret Espy was the

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owner of lots thirteen and nineteen, in Smith & Purcell's sub-division of lots eight, and nine, in Jones' sub-division of section 37, township 16, in range 3, in the city of Indianapolis, upon each of which lots there was an incumbrance of seventy-one dollars, and fifty-two cents, and to induce the plaintiff to exchange his real estate for the real estate of the defendant, the defendants, Espy and Vinnedge, falsely represented the lots owned by the defendant Espy, to be situated within one, and one fourth miles northwest from the circle, in the city of Indianapolis, and adjoining the populous part of said city, and within a few rods of several manufacturing establishments, and relying upon said representations, the plaintiff says he did exchange his real estate with the defendant Espy, the plaintiff agreeing to assume the incumbrances on the lots in Indianapolis, and the defendant agreeing to assume the incumbrance upon the Bartholomew county property by the plaintiff to the defendant Espy, and the plaintiff alleges that the lots conveyed by the defendant Espy to him, were situated four and one-fourth miles from the circle, were not adjoining populous parts of the city, nor within a few rods of any manufacturing establishments, and were not worth more than \$100 each, whereas lots located as they were represented to be, would have been worth one thousand dollars each, wherefore plaintiff claims damages, &c.

The second paragraph is similar, except that it charges that the defendants "for the purpose of cheating and defrauding" the plaintiff, "falsely and fraudulently represented" the lots to be located," &c., (giving the location, &c., as in the first paragraph,) and continues,—*"and plaintiff further avers that he did know the situation and location of said lots, but relying wholly and entirely on said false and fraudulent representations,"* he did exchange, &c.

Separate demurrers were filed to each paragraph of the

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complaint, which demurrers were overruled, and excepted to by the defendants. These rulings constitute the first, and only question for consideration.

It will be seen that the first paragraph simply charges the defendant with having made false representations in regard to the location of the real estate for the purpose of inducing the plaintiff to make the exchange. It is objected that this is insufficient as to each of the defendants, because it is not alleged that the defendants knowingly misrepresented the location of the real estate.

This objection is not well taken in behalf of the defendant, Margaret F. Espy. She is charged as being the owner of the real estate, and as such owner, when negotiating for the sale of the same, she ought not to have made material statements in regard to the location and surroundings of the same, for the purpose of enhancing its value in the mind of the person with whom she was about to deal, unless she knew the statements to be true. If they were false, and the purchaser was thereby deceived to his injury, she ought, in law, and in equity, to be held to make the representations good. The rule is, that if a material statement is in fact false, and is uttered for the purpose of inducing another to rely upon the truth of the same, and act in reference to its truth, and he does so rely and act, and is thereby prejudiced, it has the whole effect of fraud in vitiating the contract, although the person uttering the statement did not know it to be false, but believed it to be true. *Woodruff v. Garner*, 27 Ind., 4; *Frenzel et al. v. Miller*, 37 Ind., 1; *Willard's Eq., Jurisprudence*, 149, 150, and authorities there cited; 1 *Story's Eq.* 193.

In the case of *McFerran v. Taylor*, 3 Cranch, 281; the Supreme Court of the United States uses the following language: "He who sells property on a description given by himself is bound to make good that description, and if it

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be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance."

The first paragraph of the complaint is, however, insufficient as to the defendant, Vinnedge. He was not the owner of the real estate, nor is he charged with being the agent of the owner, nor engaged in any conspiracy with the owner for the purpose of defrauding the plaintiff, nor in any way interested in making the sale or change. As far as appears from the complaint, he was a stranger to the transaction. The rule of law above stated rests upon the ground, that the party selling the property must be presumed to know whether the representation which he makes of it is true or false. *Smith v. Richards*, 13 Pet., 38.

This presumption would not apply to a mere stranger, not in any way shown to be interested in the sale as agent of the owner, or otherwise.

The separate demurrer of Vinnedge should, therefore, have been sustained to the first paragraph of the complaint.

The second paragraph of the complaint avers that the plaintiff "*did know the* situation and location of said lots, but relying wholly, and entirely upon said false, and fraudulent representations," &c.

We suspect the word *not*, was intended to have been used after the word "*did*," and the sentence was intended to have read "*did not know*," &c.

But the sentence is grammatically correct as it is, it is not apparent on its face that there was an omission, and it is only from the fact that the word *not* is necessary, and material in order to make a good complaint, that we are led to infer that it was unintentionally omitted. This suspicion, or inference, is not sufficient, however, to enable us to supply the word, and thus make a good complaint by inserting a material averment, and we must consider the complaint as the parties have made it.

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If the plaintiff knew the situation, and location of the lots, he had no right to rely upon what he must, with such knowledge, have known was a false statement in regard to the same.

The second paragraph was, therefore, bad, as to each of the defendants, and the demurrer of each should have been sustained. After answer was filed, the cause was tried at Special Term, resulting in a general finding, and judgment for the plaintiff, against each of the defendants. They filed separate motions for a new trial which were overruled.

Where a complaint contains one good paragraph, and there is a general finding and judgment upon the whole complaint, it will be presumed to be upon the good paragraph of the complaint. *Newell v. Downs*, 8 *Blackf.*, 523; *Culbertson v. Townsend*, 6 *Ind.*, 64.

The first paragraph was good as to the defendant, Margaret F. Espy, and we see no reason to disturb the judgment as to her.

Each paragraph being bad as to Vinnedge, his motion for a new trial should have been sustained.

The judgment against the defendant, Espy, is therefore, affirmed. As to the defendant, Vinnedge, it is reversed.

The Germania Building, &c., Association, &c., v. Marot.

IN GENERAL TERM, 1874.

THE GERMANIA BUILDING, &C., ASSOCIATION, &C., Appellants,
v. JOHN R. MAROT.

REAL ESTATE—*suit to quiet title*—

EXECUTORY CONTRACT.

A, purchased certain real estate without knowledge, or notice of sale, made prior, to B, under executory contract, of the same property. B, claims said contract to be in force. A, declares it forfeited by B failing, &c., to pay purchase money, and that said contract was abandoned, and rescinded.

Held: That where such contract does not appear to be void on its face, and it not being shown that such lapse of time has occurred, that a Court of equity would necessarily refuse to enforce its execution the question as to a *bona fide* purchaser, and as to the existence of such circumstances as would defeat its inforcement, must be determined by parol evidence.

In such case the plaintiff is not bound to risk the continuance in life of the witnesses that may furnish that evidence.

Taylor, Rand & Taylor, for appellants.

Barbour, Jacobs & Williams, for appellees.

PERKINS, J.—Suit to quiet title. The complaint contains two paragraphs. The first describes the real estate, alleges that the plaintiff is the owner in fee simple of it, and avers "that the defendant claims title to said real estate, and an interest therein adverse to plaintiff, and said claim throws a very dark cloud upon plaintiff's title." Plaintiff further states

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that defendant's claim of title, and interest is wholly false and groundless.

The second paragraph alleges that the plaintiff is the owner in fee simple of certain real estate, particularly describing it, and that he derives title by deed from William Wier, dated 27th of September, 1871, making a copy of his deed a part of the complaint. He alleges that the defendant claims to have purchased said real estate from said Wier by executory contract, before plaintiff purchased the same, by which contract he was to receive a deed for said real estate on the payment of \$5,000, which contract defendant claims was, and is, in writing, and in full force.

Plaintiff alleges that it purchased said real estate without any knowledge, or notice of said outstanding contract, and paid the full price therefor, viz: \$6,500 and received a deed. Plaintiff further alleges that defendant forfeited his said contract, by failing, and refusing to pay the purchase money, and that said contract was abandoned, and rescinded by the parties to it, before its purchase, &c., but that said defendant is still claiming the same to be in full force, &c.

A demurrer to both paragraphs of complaint was sustained, and the plaintiff, electing to stand by its complaint, and refusing to amend, final judgment was rendered for the defendant.

We are inclined to think the first paragraph of the complaint bad, for not setting forth the nature of the defendant's claim of title, or ground of interest, but it is not necessary that we decide the point.

The second paragraph of the complaint, we think, is good.

The defendant insists that it is bad, because it shows that the contract under which he is alleged to claim an interest, is void, and hence no cloud upon the plaintiff's title.

If it is shown that that contract is void upon its face, the

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defendant's position is well taken. But if it does not show that the contract is void upon its face, but only that it may be shown to be so by parol evidence, we think his position is not well taken.

We understand the law to be that:

1st. Where a written instrument is void upon its face, it constitutes no cloud upon title to land.

2d. Where it is not void upon its face, but must appear to be so on the face of documents, or proceedings, on which the alleged claimant must rely, and which he must produce, to sustain the validity of the deed, or instrument on which his claim is founded, as in cases of sales under powers, as tax sales, &c., in such cases the written instrument constitutes no cloud, and a suit will not lie for its cancellation.

3d. But where the written instrument is not void on its face, and its invalidity must be made out by parol evidence, in such case, it is a cloud upon the title of the land it describes, and a suit may be sustained for its cancellation. *Fonda v. Sage*, 48 N. Y., 170; *Newell v. Wheeler*, *id.*, 486.

Such is the case made by the second paragraph of the complaint under consideration. The contract does not appear to be one void upon its face. It is not shown that such lapse of time has occurred, that a Court of equity would necessarily refuse to enforce its execution, and the question as to *bona fide* purchaser, and as to the existence of such circumstances as would defeat its enforcement, must be determined by parol evidence, and the plaintiff is not bound to risk the continuance in life of the witnesses that may furnish that evidence.

The judgment is reversed.

Irwin, and Williams v. Smith, and Rickets.

IN GENERAL TERM, 1874.

VOLNEY Q. IRWIN AND JEREMIAH H. WILLIAMS v. BENJAMIN
E. SMITH AND DILLARD RICKETS, Appellants.

CONTRACT—construction of.

Where an expression in a written contract is of doubtful meaning, or is capable of different constructions, and in the performance of the contract the parties have mutually acted on a given construction, or one of the parties has knowingly acquiesced in a construction given by the other, and the acquiescing party has received benefits that would not have been conceded to him if a different construction had been insisted on, the construction thus given to the contract by the parties must govern in case of a suit upon the contract.

McDonald & Butler, for appellants.
James Buchanan, for appellee.

NEWCOMB, J.—The defendants, with divers other parties not served with process in this case, were a firm of railroad contractors, under the partnership name of B. E. Smith and associates; and, as such, contracted with the proper railroad company to construct the Indianapolis, Bloomington, and Western Railway. The plaintiffs took a contract from B. E. Smith and associates, to grade a portion of said railway, according to certain specifications annexed to the contract. This suit was brought to recover compensation for work alleged to have been done under that sub-contract. There was a jury trial at Special Term, which resulted in a verdict of \$11,549.28, in favor of the plaintiffs. The defendants moved for a new trial. The motion was overruled, and

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judgment entered on the verdict, from which judgment the defendants appealed to the General Term. The question in the case arises on the construction to be given to a clause of the contract relative to earth excavated from "borrowing pits" to construct embankments. In the specifications, to which reference is made in the contract, is this clause :

"All material will be measured in excavation only, whether taken from the cuts upon the line, or from ditches and borrowing pits to form embankments, and no allowances of haul will be made unless the material excavated is required to be taken beyond the limits of the section upon which it is found." Of the lengthy contract the following are the additional provisions that have any importance in the case.

"The earth from the excavations shall form the embankment as far as the Engineer of said railway shall direct, and the surplus earth shall be distributed so as to widen the embankment uniformly, or formed into spoil banks at such places as the Engineer of said railway shall direct, with evenness and regularity.

"When the excavations do not furnish materials sufficient to make the embankments, the deficiency shall be made up by widening the excavations uniformly, or by borrowing from such points as the Engineer shall designate, which shall be estimated and allowed as excavation."

"The Engineer of said railway shall estimate the work done by the party of the first part—Irwin and Williams—under the contract, and the value of any extra work not herein provided for, and the estimates so made shall be final and conclusive between the parties."

"And the said party of the second part does hereby consent and agree to pay to the said party of the first part, in manner hereinafter mentioned, for the work agreed by this contract to be done as follows: * * * * * For earth excavation and grubbing, and clearing, fifteen cents per cubic

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yard ; and for embankment, including the grubbing and clearing, twenty-four cents per cubic yard. * * * And it is further agreed, that in case any dispute, or differences, shall arise between the said parties as to the construction, or true meaning and intent of this agreement, or the sufficiency of the performance of said work, that such disputes, and differences shall be considered and decided by the Chief Engineer for the time being of said railway, whose determination shall be final and conclusive between the parties, and said parties do hereby submit all and singular the premises, to the award, arbitration, and decision of said Chief Engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever. And it is further agreed, that the submission to said Chief Engineer, touching all matters herein contained, agreed to be submitted to him, shall be deemed, considered, and taken as an essential part of this agreement, and not revocable by either of the parties hereto."

The question presented by the appeal is, whether the plaintiffs were entitled to fifteen cents per cubic yard for earth excavated from borrowing pits, for the purpose of making embankments, or whether their pay should, for such earth, be limited to the price agreed upon for embankment.

If the plaintiffs are entitled to be paid for earth from the borrowing pits, both as excavation and embankment, the verdict was right ; otherwise it cannot be sustained.

It was stipulated in the contract, that monthly approximate estimates of the work done by the plaintiffs, should be made by the Engineer in charge, and that within ten days thereafter such estimates should be paid by B. E. Smith and associates, less twenty per cent. which they were entitled to hold until the completion of the work.

The plaintiffs claim that the words, "which shall be estimated and allowed as excavation," mean that all dirt taken

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from borrowing pits shall be paid for as excavation at fifteen cents per cubic yard, and paid for again as embankment at twenty-four cents per yard. The defendants, on the contrary, insist that these words only prescribe a rule of measurement; that they are but a repetition, in different language, of the rule of measurement defined in the specifications, and have no reference to compensation. The Judge who presided at Special Term, adopted the construction claimed by the plaintiffs, and instructed the jury, after reciting the clauses of the contract in reference to excavations, embankments, borrowing pits, and the rates of compensation provided for the different classes of work, as follows: "Under these provisions the excavating of the deficient material spoken of in the first clause quoted," (concerning borrowing pits) "is to be paid for at fifteen cents per cubic yard, as well as the excavation in the line of the road; but before the plaintiffs can recover for such deficiency, they must use all the excavations in the line, or prism of the road, on any section, to make the embankment in such section, unless the Chief Engineer of the railroad company, having the road in charge, permitted the plaintiffs to waste in spoil banks, excavation in the line, or prism of the road on such section, and to borrow the deficiency."

It was conceded in the argument, and the evidence shows, that except as to a few yards of embankment, the verdict was rendered solely for earth taken from borrowing pits to construct embankment, at fifteen cents per yard for the excavation thereof, it having been paid for as embankment at twenty-four cents per yard, and which was not carried into the monthly estimates, nor the final estimate, as excavation.

Evidence was admitted on the trial, over the plaintiffs objections, tending to show that the parties, during the progress of the work, each construed that part of the contract relating to deficient material taken from borrowing pits, as not

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entitling the plaintiffs to payment therefor as excavation, but as simply establishing a rule by which the quantity of earth to be taken for embankment should be measured and estimated as to quantity. The instruction from which we have quoted withdrew this evidence from the jury, and required them to find in the plaintiffs favor for this deficient material as excavation, at fifteen cents per cubic yard. We think it by no means clear that the construction given the contract by the Judge at Special Term was correct, construed by its own terms, for these reasons :

1st. If the intention of the parties was, that the contractors should receive thirty-nine cents for each yard of embankment, whether taken from cuts in the line of road, or from borrowing pits, they could have so expressed themselves in the contract in fewer, and more perspicuous words than those used, by simply providing that for every yard put in embankments thirty-nine cents should be paid, and for all material from cuts, wasted in spoil banks, fifteen cents should be paid.

2d. That when the parties intended to express the idea of payment, they used apt and unmistakable words to express their meaning, for example, this provision: " That excavations, and embankments for road crossings shall be made of such dimensions, and form, as shall be directed by said Engineer, and estimated *and paid for*, at the same price per cubic yard as other work on the sections."

3d. The word "estimate" is used in the contract indifferently as a measure of quantity, as well as of value. For instance, the contract provides that, " The Engineer of said railway shall estimate the *work done* by the party of the first part under this contract, and the *value* of any extra work not herein provided for, and the estimates so made shall be final, and conclusive between the parties." In the first clause of this sentence the word "estimate" evidently means to

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measure, or determine; in the second, to do that, and also fix a value on the work after its quantity is so determined.

It seems to us that the controverted phrase "estimated and allowed as excavation," is reasonably susceptible of more than one construction, and in such cases extrinsic circumstances, and especially the actions of the parties under the contract, may be shown to aid in arriving at the proper construction.

In other words, the Court will, in such cases, place itself, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted. *Simpkins v. Oakley*, 1 *Blackf.*, 537; *Bates v. De Haven*, 10 *Ind.*, 319; 2 *Parsons on Contracts*, 564; *Bradley v. The Steam Packet Co.*, 13 *Peters*, 89; 1 *Greenleaf on Evidence*, § 295.

The extrinsic evidence introduced by the defendant was directed to these two propositions, viz: that there was a mutual, and *agreed* understanding between Alexander, the Chief Engineer in charge of the work, and the plaintiffs, that this now disputed clause did not entitle them to pay as excavation for dirt taken from borrowing pits, and that because of such mutual construction, Alexander permitted the plaintiffs to waste, in large quantities, material taken out of cuts in the prism of the road, which was paid for as excavation, when it was more profitable for the plaintiffs to do so, and to supply the deficiency caused by such waste, by taking material from borrowing pits along side the line of embankment.

2. That Alexander acted from the beginning of the work on the construction of the contract now asserted by the defendants; that the plaintiffs knew he so construed the contract, and because of such construction he permitted them to waste excavated earth at pleasure, and that they made no objection to his construction until after the completion of

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the work and the final estimate, and after they had secured the full benefit of Alexander's construction by being allowed to waste and borrow material as they deemed most to their interest.

The answers of the jury to interrogatories show that they found there was no express agreement, or understanding between Alexander and the plaintiffs as to the construction of this clause of the contract, and as the evidence on that point was conflicting, we are bound by the decision of the jury. But the evidence does show, and on this proposition we are unable to discover any conflict in the testimony, that Alexander did construe the contract as not providing for payment as excavation of deficient material taken from borrowing pits; that in consequence of this construction he permitted the plaintiffs to waste earth that he might have required them to put into embankments at heavy expense; that the plaintiffs knew soon after the work was commenced that such was his construction; that they made no objection to it until after the work was completed, and they had received all the benefit that could accrue to them by permission to waste earth taken from excavations.

On these points Alexander testified as follows: "As to the measuring I construed the contract to mean that it had to be measured in excavation—that was the plain English of it—and that all of the material that went into the banks was to be paid for at twenty-four cents a yard, and all the material that was taken out of the cuts in the road bed was to be paid for at fifteen cents a yard. The measurement of what went into the banks was to be measured in excavation, and the banks were not to be measured."

Question by defendants.—"What was the construction with regard to the estimate of earth that was taken for the purpose of finishing out embankments, when the cut did not make the embankment—borrowing pits?"

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Answer.—"My construction was that I had authority to direct in regard to that matter; if it was a material thing for the railroad company, or to the general contractors, B. E. Smith and associates, I had a right to direct Mr. Irwin what to do in cases where it interfered with their rights; but in general I was not to interfere with Irwin and Williams in borrowing and wasting; they were to do as they pleased in that matter, except in rare instances. The construction was, that it did not affect anybody's interest, whether they borrowed or wasted, or not; and consequently, at Mr. Irwin's suggestion, and solicitation, he was allowed to do as he pleased about that. He stated (and I agreed to it) that it did not affect anybody's interest whether they borrowed a bank here, and wasted a cut there, or not. The construction was, that the earth taken out of borrowing pits should be measured in the natural bed in which nature left it, and that if it went into a bank (which of course it did) it was to be paid for at twenty-four cents a yard. The measurement was governed by the bed from which the dirt came, but the payment was to be governed by what was done with it. What was taken out of the cuts in the road bed, and thrown away, or put into banks either, was to be paid for at fifteen cents a yard, as to the taking of it out, and of course, if it was put into banks, they would not be under the necessity of borrowing dirt to put into that bank, and there would be no borrowing pit to measure."

Question.—"What knowledge had Irwin and Williams of your construction of that contract?"

Answer.—"They had a perfect knowledge of it from the beginning. I would like to state further, that in regard to this construction I consulted with Mr. Irwin, and had a perfect agreement, and understanding. That was the construction, and intention invariably on all these points."

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Question.—"What knowledge, if any, had Mr. Williams of your construction of the contract?"

Answer.—"A perfect and complete knowledge of the whole thing—it was talked over frequently."

Question.—"What objection, if any, or acceptance, was made of your construction of it by Irwin and Williams?"

Answer.—"They accepted it."

Irwin and Williams each testified that they had no understanding or agreement with Alexander in reference to such construction of the contract, and that they did not accept it. It becomes important, therefore, to consider the acts of the plaintiffs during the performance of the contract, and their silence under circumstances where good faith required them to object, if such circumstances existed.

There is no essential disagreement between the testimony of Alexander and the plaintiffs as to the fact that the former indulged the latter in wasting, and borrowing earth at pleasure, and the evidence shows that the plaintiffs derived substantial benefits thereby. We give a few examples. On section 21 the final estimate shows excavation 16,450 yards; embankment, 13,948 yards. Irwin testified in regard to this section, as follows: "The bulk of the excavation was wasted there, it was all in one cut and at the east end of the section. There was a large cut at the east end, and a little cut, and close to that was a tressel; beyond the cut it was all borrowed clear through. There was an old grade there, built fifteen, or sixteen years ago, but the great bulk of the earth in that section was borrowed, because we would have had to haul the excavation three-fourths of a mile to put it into a bank."

By the terms of the contract the Engineer had power to compel the plaintiffs to make the embankment of a given section from the earth excavated on such section. Had he done so on this section alone, the claim of the plaintiffs on

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which the verdict was obtained would have been nearly \$2,000 less.

On section 22, Irwin testified, there were from 3,000 to 4,000 yards of earth wasted, and about 10,000 yards of fill. The estimate for section 25, shows of excavation 2,835 yards of embankment 5,285 yards. Irwin testified that the cut in that section was at the west end, and the earth taken from it was all wasted.

We now proceed to the inquiry, did Irwin and Williams know while they were taking advantage of Alexander's indulgence as to waste, that he construed the contract as not providing for payment as excavation of earth taken from borrowing pits, and did they acquiesce in such construction?

These facts are shown by the evidence :

1. Irwin and Williams examined the profile of the road before entering into the contract. This profile showed that there would be a large excess of embankment over excavation on the sections on which they bid.

2. Monthly approximate estimates of the amount of the two classes of work were made, and delivered to the plaintiffs during the progress of the work, on which they drew pay in accordance with the estimates.

3. Every monthly estimate, commencing with the month of November, 1869, and ending with the month of September, 1870, showed upon its face that no allowance for payment was made for material taken from borrowing pits; because they all showed much larger quantities of embankment than excavation.

4. Irwin and Williams knew that payment was not being made for borrowing pits, as the estimates were placed in their hands from ten to fifteen days prior to the monthly payments, and they could not help seeing that they were not being paid for borrowing pit excavations; and in addition to this we have the testimony of Irwin that his attention was specially

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directed to the character of the estimates. In his cross-examination we find the following:

Question.—"Do you swear that Mr. Alexander did not explain any estimates to you?"

Answer.—"What do you mean by explaining an estimate?"

"Showing you the amount of work you had done, where it was, what sections it was on, and the amount of yards of excavation and embankment."

Answer.—"He did that every month except August. I do not think he gave us any statement for August."

As a specimen of the form of monthly estimates, we copy from the bill of exceptions the one for January, 1870:

Estimate for January, 1870, Irwin and Williams:

Section 19,	3,191 ex.	8,461 em.	
" 17,	740 "	5,376 "	
" 18,	10,354 "	16,124 "	
" 19,	199 "	876 "	
" 21,	7,096 "	3,375 "	
" 22,	3,022 "	12,055 "	
	<hr/> 24,592	<hr/> 46,267	
	24,592 cu. yds. ex. at 15 cts.....	3,688 80	
	42,267 cu. yds. em. at 24 cts.....	\$11,104 08	
		<hr/> \$14,792 88	
	Less 20 per cent.....	2,958 57	
		<hr/> \$11,834 31	
	Former payments.....	8,092 23	
		<hr/> \$3,742 08	

This estimate shows an excess of embankment of nearly one hundred per cent.; every other estimate shows a large excess of embankment, and the final estimate made the total

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work, excavation 159,261 yards; embankment, 206,645 yards.

There is no evidence that Irwin and Williams, or either of them, at any time during the progress of the work, objected to the estimates on the ground, that borrowed earth was not being paid for as excavation, or that they claimed it should be so paid for; and it is a suggestive circumstance that on several occasions when short of money they borrowed of the paymaster of the road, at 12 per cent interest, when if their present claims were well founded, they had a right to demand of the defendants an amount much in excess of the sums borrowed, and they made no such demand.

From these facts the conclusion is irresistible, that, while there may have been no formal agreement, or understanding between Alexander and the plaintiffs, that the contract did not give the latter 15 cents per yard for borrow pit excavation, both parties acted on that construction, and that for that reason Alexander granted the plaintiffs privileges, that he would not otherwise have granted, and which he could not have granted without a gross violation of his duty to the other contracting parties.

It was said by the Supreme Court in *Bates v. DeHaven*, 10 *Ind.*, 322, that: "evidence of the mutual acts of the parties in reference to the fulfilment of the contract after it was entered into, was properly admitted to show what their intention and understanding was in the use of language otherwise somewhat obscure.

We think that on the facts appearing in the record, the Judge trying this cause erred in instructing the jury that the plaintiffs were entitled to pay at the rate of fifteen cents per yard for earth excavated from borrowing pits.

It is insisted, however, by the counsel for the plaintiffs, that the error, if any there was in this instruction, was cured by the 19th instruction. That instruction recites the clause of the contract empowering the Engineer to settle its construction in cases of dispute, and proceeds as follows:

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"This clause of the contract is binding upon the plaintiffs. It is a part of the contract they deliberately entered into; it is supported by a valid consideration; they will not be permitted to disregard it."

If therefore you, gentlemen of the jury, find from the evidence that James B. Alexander was the Chief Engineer of this Railway Company, during the time of the construction of that part of the railway which included plaintiffs' work, and if you find from the evidence that questions arose calling for a construction of said contract, that said Alexander as said Engineer, did put a construction upon said contract, and if you further find from the evidence, that these plaintiffs and defendants, with a full knowledge of all the facts, and with a full knowledge of the construction put upon said contract by said Engineer, did accept, consent to, and agree with the construction so put upon said contract by said Engineer, then I instruct you that the plaintiffs are bound by the construction put upon said contract by said Engineer; and if your further find that said Engineer honestly and correctly estimated, and measured the work done by plaintiffs under said contract, and in accordance with the construction thereof as agreed to by the plaintiffs, and defendants, and that plaintiffs have been paid for said work done by them, then it will be your duty to find for the defendants. But if you find the said Engineer did not honestly, or correctly estimate, and measure the work, and that defendants have not paid for all the work at the contract price, actually done, then you should find for the plaintiffs."

This instruction is predicated on the hypothesis that a question of construction had arisen between the parties, calling for an authoritative decision by the Engineer; that a construction was given by the Engineer, and that with full knowledge thereof, the plaintiffs did accept, consent to, and agree with the construction so given by the Engineer to the contract.

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The jury must have understood from this instruction that to absolve the defendants from liability, there must have been a dispute, or controversy, as to the construction of the contract, and that the Engineer decided between the parties. In fact, there was no controversy, or question; both parties acted on the same construction, and the jury were not instructed as to the conclusions that might be drawn from the acts, or silence of the plaintiffs, with knowledge of the construction given to the contract by Alexander. We think it more than probable also, that the jury may have understood the closing paragraph of the instruction as requiring them to give the plaintiffs a verdict for all excavation actually done, notwithstanding the adverse construction of the Chief Engineer, and we think that they must have so understood it, unless they should find that there had been an actual dispute, and a formal construction of the contract by the Engineer in consequence thereof.

We hold that the uncontroverted evidence shows that the contract was construed by each of the parties while the work was in progress; by Alexander expressly, and by the plaintiffs tacitly, as manifested by their acts and silence as above stated; that the construction of each was the same as that claimed by the defendants at the trial, and that such construction having been mutually acted upon must be held to be the proper and true construction.

The bill of exceptions shows, that at the time of the final estimate, Irwin and Williams disputed the accuracy of measurements of their work; but there is no evidence whatever that they then, or previously claimed that they should be paid for excavating borrowing pits. Their complaints went to the measurement of the embankments, and excavations in the line of road, as we understand the evidence.

The judgment at Special Term is reversed, with instructions to grant the defendants a new trial.

O'Brien, Pontius, McClelland, and Cook v. O'Brien, and Flanders *et al.*

IN GENERAL TERM, 1874.

WILLIAM O'BRIEN, JOHN PONTIUS, JOHN T. MCCLELLAND,
and LEVI H. COOK v. JAMES O'BRIEN, JAMES
M. FLANDERS, (Appellant) ET AL.

MORTGAGOR—

MORTGAGEE.

An indemnifying mortgage, of real estate, sought to be purchased, contained a provision that whenever any part or portion of the mortgaged lands can be sold by the mortgagor for their fair and adequate value, the mortgagors should release such part of the property, reserving sufficient to secure them for any amount of actual loss they may sustain.

About one-half of the mortgaged lands were encumbered by older liens, and the amounts for which the mortgagees were liable, were not ascertained at the time the mortgage was made.

Held: That the parties must be presumed to have contracted with reference to the older lien, and where there is nothing to show that the mortgagees attempted to hold a lien for more than might be justly due them, or that the mortgagor ever attempted to derive any benefit from the right to sell the real estate, or to show that either mortgagor, or mortgagees attempted, or intended that the proceeds, if any, of the real estate had been sold, should be applied to any other purpose than the payment of the mortgage debts, the mortgage cannot be held fraudulent by reason of the clause in reference to the sale of the mortgaged property.

Whether a mortgage is given with a fraudulent intent, is a question of fact to be determined by the Court, and the jury trying the cause.

Baker, Hord & Hendricks; Voss, Davis & Holman, for Appellant.

McDonald & Butler, for Appellee.

O'Brien, Pontius, McClelland, and Cook v. O'Brien, and Flanders *et al.*

BLAIR, J.—This suit was commenced in the Hamilton Common Pleas Court, to foreclose a mortgage on certain real estate situated in that county. The cause was brought into this Court by changes of venue, and by agreement. The mortgage was made by James O'Brien, on the 3d day of May, 1870, and embraces several tracts of land in all not far from one thousand acres. It was made to secure and indemnify William O'Brien, John Pontius, John F. McClelland, Levi H. Cook, Earl S. Stone, Daniel R. Brown, Marcus L. Stone and Robert L. Wilson as sureties for the mortgagor, on certain bonds made by him as guardian and as administrator. The mortgagees were not all of them sureties on any one bond. The aggregate penal amount of the bonds was about thirty thousand dollars. The complaint avers that the plaintiffs had been compelled to pay, as such sureties, on the 25th day of January, 1871, about five thousand dollars. It is also alleged that on the next day after the mortgage was executed, that is on the 4th day of May, 1870, some thirteen different judgments were rendered in the Court of Common Pleas of Hamilton county, against mortgagor, James O'Brien; the judgments amounting to about fifteen thousand dollars. The judgments were in favor of different parties, but the greater portion of them were assigned to the defendant, Flanders, who caused execution to be issued thereon, and levied upon the real estate described in the mortgage, and the same was sold on the 18th day of January, 1871, to satisfy said executions, and was purchased by Flanders for thirteen thousand dollars.

The mortgage sought to be foreclosed contained the following provision: "And it is hereby further provided, as one of the conditions of this mortgage, upon which it is accepted by the mortgagees, that whenever any part, or portion of said lands can be sold by said O'Brien for their fair, and adequate value, that the acceptors of this security shall release such

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part of the mortgage property—always reserving a sufficiency by this mortgage to secure them for any amount of actual loss they may be liable to sustain.”

A demurrer to the complaint was overruled.

The defendant, Flanders, then answered in five paragraphs. The first was a general denial, to the second a demurrer was sustained, and the fifth was struck out. As no questions are raised on the action of the Court upon these paragraphs, but what are presented by other rulings, they need not be further noticed.

The third paragraph admits the purchase under the judgments as set out in the complaint, and alleges that he afterwards received a deed for the same. The defendant then says, that at the time of the execution of the mortgage sought to be foreclosed, the lands mortgaged comprised all the property of the said James O'Brien, and he was at the time it was executed notoriously insolvent, and in failing circumstances, that his debts amounted to about the sum of sixty thousand dollars, and the value of his property was about thirty-five thousand dollars, and that suits were then pending against him for the collection of a portion of the debts, all of which the plaintiffs then knew; and that the defendant was himself surety for the said O'Brien, and liable to have to pay about ten thousand dollars as such surety. The provision of the mortgage heretofore set out as contained in the complaint, was then copied in the answer, and it is alleged that it was known to O'Brien, and the plaintiffs, and their co-mortgagees; “that the probable and necessary legal effect of said mortgage, with the condition aforesaid, would be to hinder and delay all the other creditors of said James O'Brien,” wherefore the mortgage was fraudulent and void.

A demurrer was overruled to this paragraph of answer.

The fourth paragraph alleges title in the defendant to a part of the lands described in the mortgage by virtue of being

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the purchaser of the same under certain foreclosures, and decrees for the sale of the same upon older mortgages than the one sought to be foreclosed by the plaintiffs.

Issues were joined on the third, and fourth paragraphs of the answer. The cause was tried by the Court, and by request a special finding of facts, and conclusions of law was rendered. A decree of foreclosure was rendered in favor of the plaintiffs for about the sum claimed in the complaint. The defendant, Flanders, excepted to the conclusions of law. He then filed a motion for a new trial, which was overruled, exceptions entered, and an appeal taken to General Term.

The appellant presents but one question in his brief, and it is claimed that this arises upon the rulings on demurrer, and also upon the exceptions reserved to the conclusions of law. It is claimed that the mortgage is void on its face on account of the clause before cited, by which the mortgagees agree to release any part or portion of the lands mortgaged, whenever sold for their fair cash value by the mortgagor.

We deem it unnecessary to set out the special finding of facts, and conclusion of law, as they are very long and could aid us but little. It was found by the Court that about one-half of the lands described in the plaintiffs mortgage was held by the defendant, Flanders, free from any lien of the plaintiffs, he having purchased under liens that existed prior to the execution of the plaintiffs mortgage. The parties must have had full knowledge of these prior liens, and acted with reference to the same at the time the mortgage was made, and this takes away from the transaction one of its features that would seem to indicate an intention to hold a large security for a comparatively small portion of the debts of the mortgagor. The special findings show that the amounts for which the plaintiffs were liable as sureties on the several bonds, were not definitely ascertained until some

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months after the mortgage was made. The mortgage was placed upon the record the next day after it was made, thus showing that there was no concealment about it. It is conceded in argument (as is the law) that a person in failing circumstances may prefer a part of his creditors, if he do so in good faith, and without the design of securing a benefit to himself. A mortgage of personal property reserving possession in the mortgagor, and a power of disposing of it, if made by one in failing circumstances, would perhaps always be regarded as fraudulent. This rule arises in a great measure from the peculiar character of the property, the facility with which it may be concealed, or parted with, possession given, and a good title free from either actual, or constructive notice of the claims of others. The reasons upon which the rule is founded do not apply with full force to real estate, where conveyances and liens are a matter of record of which parties must take notice. If there were liens upon the real estate mortgaged, which were older than the lien created by the mortgage, all parties had notice thereof. The lien of the defendants judgments attached the next day after the mortgage of the plaintiffs was made, and on the same day it was recorded. The mortgage contained a clause by which the mortgagee agreed to release such portions of the lands mortgaged as could be sold by the mortgagor at their fair, and adequate value, but there is no stipulation that the proceeds of such sale should enure to the benefit of the mortgagor to the exclusion of the rights of his creditors. Nor is there any finding that indicates any attempt on the part of the mortgagees, or the mortgagor, to use this clause as a shield against the creditors. If any part of the lands had been released under this agreement, the lien of the judgments under which the defendant claims, would have attached immediately, and with all the force such liens would have had if the mortgage had never been made. The

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defendant gets all the real estate, except that portion of it which is subject to the lien for the amounts due the plaintiff. There is nothing in the special findings, or the complaint to indicate that the plaintiffs attempted to hold a lien for more than was justly due them, or that the mortgagor ever attempted to derive any benefit from the clause in the mortgage which is called in question by the defendant, or to show that it was the intention of either, that if any part of the real estate had been sold by the mortgagor, the proceeds should not be applied to the payment of the debts of the mortgagor.

Under such circumstances, we cannot say that the mortgage was fraudulent on its face. The complaint was, therefore, good, and the action of the Court in overruling the demurrer thereto, was right.

Whether a mortgage is given with a fraudulent intent, is under the statute (Sec. 21, 1 G. & H., p. 353) a question of fact to be determined by the Court or jury trying the cause. *Maple v. Burnside et al.*, 22 Ind., 139.

There is no finding in the case which indicates any fraudulent intent, further than that which arises from the face of the mortgage, and the indebtedness, and insolvency of the mortgagor. It does not follow from these facts, that the Court was bound to find, as a conclusion of law, that the mortgage was fraudulent.

The judgment is, therefore, affirmed.

Perkins, J., having at one time been of counsel in the cause, was absent.

Knight v. Edwards.

IN GENERAL TERM, 1874.

JOHN KNIGHT v. JOHN WALL, JOEL B. EDWARDS, (Appellant)
WILLIAM L. OGE, JOHN S. PATTERSON, AND
THOMAS COTTRELL.

APPEAL—notice to parties in—
SUPERIOR COURT—appeal in.

The rule of the statute regulating appeals from the Circuit to the Supreme Court, governs in like cases, from the Special to the General Term of the Superior Court.

In, an appeal to the General Term, where there are several defendants, all are required to be made parties, in the manner required by the statute, else the appeal will be dismissed.

Dye & Harris, for appellant.

Beck & Sullivan, for appellee.

NEWCOMB, J.—Knight sued the plaintiffs above named on a promissory note, to which the names of Wall, and Edwards appear as makers, and those of the others as assignees, the note not being negotiable under the statute of this State.

All the defendants, except Edwards, were defaulted. He defended on the ground that he executed the note as surety for Wall, and that Oge, the payee, and then holder, extended the time of payment for several months after the note became due, for the consideration of fifteen per cent. interest, paid at the time of the agreement for said extension; all without the knowledge, or consent, of him, Edwards. There was a

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finding against Edwards on the issues made by his answer, and over his motion for a new trial a joint judgment was rendered against all the defendants. None of them, except Edwards, appealed to the General Term, nor have they since been made parties to the appeal. The first question presented in this case, is the right of the defendant, Edwards, to alone prosecute an appeal from the joint judgment, without making his co-defendants parties to the appeal.

The authority of the full bench of this Court to hear appeals from Special Term, is found in Section 25 of the Act to establish Superior Courts, Acts of 1871, page 53, which provides that: "In all cases, where, under existing, or future laws of this State, a person has a right of appeal, from the Circuit Court, to the Supreme Court, an appeal may be had from a Special, to the General Term of said Superior Court."

Section 551 of the Code of Practice, under the head of "Appeals in Civil Actions," is as follows:

"A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the Clerk of the Supreme Court. Unless they appear, and decline to join, they shall be regarded as having joined, and shall be liable for their due proportion of costs. If they decline to join their names may be struck out on motion, and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities. 2 G. & H., 270.

The Supreme Court has uniformly held, that it would not entertain an appeal by one of several defendants to a judgment, unless the other defendants were made parties to the appeal, in the manner prescribed by the foregoing statute, and has repeatedly dismissed such appeals. Of the many decisions of this character, we cite *Huston v. Roosa*, 42 Ind.,

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386; *Keiser et al., v. Yandes*, 399 *ib.*; *Barnhart v. Cisma ib.*, 477; *Price et al., v. Pollock et al.*, 497, *ib.*, and *Harlan v. Watson et al.*, 526, *ib.*

The Statutes of 1871 clearly provide for appeals to the General Term, from a Special Term of this Court, only in cases where if the trial were had in the Circuit Court, an appeal would lie to the Supreme Court; consequently it follows that all the parties must be before the General Term, who would be necessary parties to an appeal from the Circuit to the Supreme Court; and the rule of practice of the Supreme Court, in this respect, must be the rule of this Court. The importance of this rule of practice, is apparent in the present case. Edwards appears, by the face of the note, to be one of the makers thereof, while Oge, Patterson, and Cottrell occupy the apparent position as assignors, and if they were liable at all in their action, their liability was secondary to that of the makers of the note. It is to their interest, therefore, that the judgment against Edwards shall stand, and it ought not to be reversed without giving them the opportunity to be heard, which the statute has provided.

The appeal is dismissed, at the cost of the appellant, Edwards.

Bacon, Sr., v. The Western Furniture Company.

IN GENERAL TERM, 1874.

HIRAM BACON, SR., Appellant, v. THE WESTERN FURNITURE
COMPANY.

FORFEITURE—*for non-payment of rent, demand*—
LEASE—*demand under, forfeiture of*—
SPECIAL FINDING.

Where a forfeiture for non-payment of rent is to be established, a strict common law demand, both as to time, and place, must be shown, unless dispensed with by agreement of the parties, or by statute. We have no statute dispensing with such demand. To establish a good demand at common law, in such case, there must be a demand of the exact amount of rent due.

Where a special finding of facts does not cover all the matters at issue, the proper remedy is an application for a *venire de novo*.

In equity, a clause providing for the forfeiture of a lease, on the ground of non-payment of rent, is usually regarded as a security for the landlord, and a Court, in the exercise of its equity powers, will in general relieve the tenant from a forfeiture, "where it has been incurred by neglecting to pay any certain sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant withholding payment."

John A. Holman, for appellant.

Hezekiah Daily, for appellee.

BLAIR, J.—This was an action to recover the possession of certain real estate. The grounds upon which a recovery was sought are as follows: The plaintiff is the owner of

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the fee, the defendant leased the premises from the plaintiffs grantor for a term of eight years from the first day of April, 1866, the rent was to be paid quarterly, at the end of each quarter, and the lease contained the following provision:— “for the non-payment of the rent aforesaid, at the times, and on the days aforesaid, and for any breach of any of the covenants herein contained, this lease may, and shall be forfeited at the option of the party of the first part, or his legal representatives, who may re-enter, and take possession of the premises, and put out, and utterly expel the parties of the second part, &c. The complaint avers that the rent for the quarter ending July 17, 1873, was not paid, that payment was demanded on that day and refused, and on the succeeding day, the 18th, under threats of legal prosecution the rent was paid, and the plaintiff on the same day served written notice on the defendant for his election to treat the lease as forfeited for the non-payment of the rent, and demanding possession of the premises. It also shows that a personal demand of possession was made on the premises.

A general denial was filed to the complaint. The cause was tried at Special Term resulting in finding for the defendant, the Court making a special finding of facts and conclusions of law thereon. Exceptions were taken to the conclusions of law, and also to the overruling of a motion for a new trial.

But one question is presented on the exceptions taken. It is this, can the plaintiff recover the possession of the premises, on the ground of the lease having been forfeited by reason of the failure to pay the rent on the 17th, after having accepted the rent on the next day.

As far as the Court found the facts, the finding is fully supported by the evidence, and upon the facts found we believe the conclusions of law are correct.

The appellant assumes in his brief, that the Court found

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that a demand for the rent was made on the 17th inst. The special finding does not, however, show that such demand was made. Upon this point the finding is as follows:

"On July 17, 1873, during business hours, in the afternoon, the plaintiff entered the business room of the defendant where rent had formerly been paid to said Sloan, (the plaintiffs grantor) and inquired of the only person he saw there, whether he was the representative of the defendant, to which such person answered that he was, plaintiff then told said person that he had an account for the ground rent of the factory, meaning the premises for the recovery of which this suit is brought, and which were occupied by defendant with her furniture factory. The person so addressed then told plaintiff, that he was not the proper person to present said account to, and to call again. Plaintiff then asked who were the members of the firm. To this question the party addressed returned no answer.

Plaintiff left, and did not call again in person, but next morning his attorney presented the account for rent, \$25, at the same place to the officer of the defendant, whose business it was to pay demands against defendant, and the rent was paid, and a receipt was given in the following form:

INDIANAPOLIS, July 17, 1873.

Received of Western Furniture Company thirty-five dollars, being \$25 ground rent and \$10 stable rent, of premises north-east corner Pratt and Alabama streets, Indianapolis, for quarter ending July 17th, 1873.

\$35.00.

HIRAM BACON, SR.,

By JOHN HOLMAN,
Attorney and Agent.

The finding further shows, that on the 18th, before receiving the rent, the "plaintiffs attorney demanded possession of the foreman in charge of the furniture factory, on the prem-

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ises described in the complaint, who declined to surrender the same, and that after receiving the rent, the written notice mentioned in the complaint was served, and this action brought.

Where a forfeiture for non-payment of rent is to be established, a strict common law demand, both as to time and place, must be shown, unless dispensed with by agreement of the parties, or by statute. *Taylor's Landlord and Tenant*, § 297 and 298, and authorities there cited.

We have no statute dispensing with such demand, nor is there anything in the lease, nor was it found by the Court, that such demand was dispensed with.

To establish a good demand at common law in such case, there must have been a demand of the exact amount of rent due. The finding of the Court does not show that any account was presented, or amount mentioned by the plaintiff on the 17th inst. Even if the evidence would have warranted a finding that the exact sum was demanded on the 17th, the motion for a new trial does not present the question so as to aid the appellant. Where the facts found do not cover all the matters at issue, the proper step is by an application for a *venire de novo*. *Smith et al. v. Jeffries*, 25 *Ind.*, 374.

The evidence as contained in the bill of exceptions, also fails to aid the plaintiff, for it does not show a good demand on the 17th.

The only testimony tending to show such demand was given by the plaintiff. He says that he inquired for a representative of the defendant, and on being informed that the person before him was such representative, he says he addressed him as follows: "My name is Hiram Bacon; I am the owner of the premises on which your factory stands at the corner of Alabama and Pratt streets, and I have a demand to make against your firm. He then asked what

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the nature of the demand was, and I said it is for the ground rent for those premises, due to-day, and which was assigned to me—\$25 ground rent, and \$10 stable rent. He at once changed countenance—said he was not the one that usually attended to that kind of business, and that he was out—told me I could call again, and turned very abruptly away.”

The lease filed with the complaint, and in evidence, only calls for \$25 rent per quarter,—nothing is said about rent for a stable, nor is there anything in the evidence explaining, or justifying the coupling of the stable rent, with the rent stipulated for in the lease.

This makes the demand bad for the reason that it was for too much. It must have been for the exact amount due by the terms of the lease.

While we regard the foregoing as sufficient to preclude a recovery by the plaintiff, we would say further, that in this class of actions the statute permits all defenses, whether legal or equitable, to be made under an answer in general denial. Such being the case it was within the equity power of the Court trying the cause, to relieve the defendant from the forfeiture, even if there had been a strict technical forfeiture of the lease.

In equity a clause providing for the forfeiture of a lease on the ground of non-payment of rent, is usually regarded as a security for the landlord, and a Court in the exercise of its equity powers, will in general relieve the tenant from a forfeiture, “where it has been incurred by neglecting to pay any certain sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant withholding payment.” *Taylor’s Landlord and Tenant*, §495.

We cannot, therefore, disturb the judgment at Special Term.

Judgment affirmed.

Risley v. The Indianapolis, Bloomington and Western Railway Co.

IN GENERAL TERM, 1874.

JOHN E. RISLEY v. THE INDIANAPOLIS, BLOOMINGTON AND
WESTERN RAILWAY COMPANY, Appellant.

JURISDICTION OF COURT.

JUDGMENT—*Credit to be given to.*

REMOVAL OF CAUSES TO FEDERAL COURT.

NIL DEBIT—*Plea of.*

The plea of *nil debit* can not be pleaded to a suit upon the judgment of a court of another State.

If a court has jurisdiction of the parties and of the subject-matter of the suit, and proceeds to render judgment, though errors and irregularities are committed, full faith and credit must be given to that judgment in all collateral proceedings thereon in other courts.

It is not enough that the court had jurisdiction at the commencement of the action, and during a portion of the proceedings; the jurisdiction must continue to the end. If it is clearly shown, that at any stage of the proceedings the jurisdiction of the court was lost, all subsequent proceedings would be void.

Under the act of Congress for the removal of causes from State to United States Courts, whenever an application for such removal is made, and it is shown to be one embraced by the act, and that the party seeking the removal has complied with the required conditions, it is the duty of the State court to proceed no further in the suit. All other proceedings are *coram non judice*. A judgment thereafter rendered in the State court would be without authority, and void.

BLAIR, J.—This is a suit by the plaintiff upon a judgment recovered against the defendant in the Supreme Court for the city, and county of New York. A transcript and copy of the record and judgment is made part of the complaint.

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An answer in three paragraphs was filed, the second and third of which were subsequently withdrawn, and an amended third paragraph, and also additional paragraphs four and five filed. The first paragraph of answer alleges that the defendant does not owe the said sum of money demanded, or any part thereof, in manner and form as the plaintiff hath thereof above complained; wherefore, &c. The amended third paragraph of answer alleges that the defendant, being the sole defendant in the cause in which the judgment was obtained, and being a corporation organized under the laws of the State of Indiana, and owning and operating a railroad in said State, and having no corporate existence in the State of New York, and being in no way a citizen, or resident of said State, and the plaintiff Risley having commenced his suit against the defendant in said State of New York, in the Supreme Court thereof, for the county and State of New York, he, then and there, being a citizen of said State, and the amount involved, or the sum demanded in said suit exceeding the sum of five hundred dollars, exclusive of costs, the defendant before the trial and final hearing of the cause, to wit, on the 24th day of June, 1870, filed in said Court her petition and affidavit for the removal of said cause into the next term of the Circuit Court of the United States to be held in the Southern District of New York, that being the District within which the said Supreme Court was then and there being held, and then and there offered and tendered to said Supreme Court, good and sufficient surety for entering in said Circuit Court of the United States on the first day of the next ensuing session copies of the process against her, and of all pleadings, depositions, testimony, and other pleadings against, or affecting, or concerning her, then pending in said Supreme Court and for the defendant then appearing in said Circuit Court of the United States, and entering special bail in said cause, if special bail was originally

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required of her of all which the plaintiff had due notice. The answer then further alleges, that it then and there became the duty of the Supreme Court of the State of New York to accept the surety, and proceed no further in the cause, that the jurisdiction of that Court then and there terminated, and the cause should have been certified to the Circuit Court of the United States, but the Supreme Court then and there denied the petition of the defendant, and refused to accept the surety, though the same was not objected to, and then and there, without authority of law, and over the objection of the defendant, and without any jurisdiction of the cause, by reason of the premises aforesaid, proceeded with said cause, and on the 4th day of December, 1871, rendered the judgment set out in the complaint, wherefore defendant says that all of the proceedings after the filing of his petition and tender of surety were void, and the judgment of said Court void, &c. Copies of the petition of the defendant, and the affidavit, bond and surety filed, and tendered in the Supreme Court of the State of New York, are filed with the answer.

The fourth paragraph is substantially the same, except that it avers that the defendant is a corporation organized under, and by virtue of the laws of the State of Illinois. The fifth is also the same, except that it alleges that the defendant is a corporation organized in pursuance of the laws of the State of Indiana, and Illinois, and formed by the consolidation of a corporation duly organized under the laws of the State of Illinois, in pursuance of the laws of said States in that behalf provided, and running and operating a railroad within the limits of said States, and having no corporate existence in the State of New York. Demurrers were sustained to each paragraph of the answer, and the defendant declining to answer further, judgment was rendered for the plaintiff. The defendant appealed to Gen-

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eral Term, and the rulings of the Court in sustaining the demurrers are assigned as errors. The first paragraph of the answer is the common law plea of *nil debit*. It has been held in some States where the common law practice prevails, that in a suit upon a judgment rendered in another State, this plea is good, and the party might, under such plea, show that the Court rendering the judgment had no jurisdiction of his person. Such was the ruling in the case of *Hall v. Williams and others*, 6 *Pick.*, 232, cited by counsel. The rulings upon this point have not, however, been uniform, even under the common law practice. *Warren v. Flagg*, 2 *Pick.*, 446, *notes*. Under the code a copy of the judgment and proceeding must be made a part of the complaint, and the language used by the Court in the case of *Hall v. Williams*, *supra*, shows clearly that the plea of *nil debit* can serve no purpose as a defense under the code. It is said there, "that on an issue formed on that plea, if it appears that the Court rendering the judgment had jurisdiction, the record is conclusive evidence of the debt." It cannot be that a plea which does not deny the record, but which rests upon the ground of a payment, &c., can be held to be a good answer under the code. Our Supreme Court has, however, expressly ruled upon the question, and held that *nil debit* cannot be pleaded to a suit upon the judgment of a Court of another State. *Davis v. Lane*, 2 *Ind.*, 548; *Buchanan v. Puit*, 5 *Ind.*, 264. So in the Supreme Court of the United States, *Mills v. Dwyer*, 7 *Cranch.*, 481; *Hampton v. Connell*, 3 *Wheat.*, 234. The ruling of the Court in sustaining the demurrer to the first paragraph of answer is, therefore, fully sustained by authority as well as by the general principles, and rules of pleading under the code. We come then to consider the question raised by the other paragraphs of the answer, they each presenting the same question. It is claimed by the defendant that having availed herself of the

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privilege given by the act of Congress by filing a petition to have the suit removed from the Supreme Court of the State of New York to the Circuit Court of the United States, and having tendered the surety required by the Act of Congress, the State Court had no authority to proceed further in the cause, and that all proceedings thereafter were *coram non judice*. It is not claimed but that the suit was properly commenced in the Supreme Court of the State of New York, and that the Court had jurisdiction of the subject matter of the suit, and acquired jurisdiction of the defendant by service in compliance with the laws of New York. The parties were then before a Court having full power to hear and determine the matter in litigation, and render a final judgment. This jurisdiction continued and remained in that Court unless it was removed by virtue of the application, and petition filed by the defendant to have the cause removed to the Circuit Court of the United States. It is insisted on the part of the plaintiff that the refusal to grant the removal was at most, but error, and that this Court cannot sit to correct errors made by the Supreme Court of New York. This is the general rule, the law being well settled, that if a Court has jurisdiction of the parties, and of the subject matter of a suit, and proceeds to render judgment, though errors and irregularities are committed, full faith and credit must be given to that judgment in all collateral proceedings thereon in other Courts. The judgment must stand unless reversed for error, or set aside for fraud. Jurisdiction of the parties, and of the subject matter, is always indispensable to the validity of a judgment, and it is not enough that the Court had jurisdiction at the commencement of the action, and during a portion of the proceedings, the jurisdiction must continue to the end. If it is shown clearly that at any stage of the proceedings the jurisdiction of the Court was lost, all subsequent proceedings

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would be void; hence the above rule cannot be held to apply where jurisdiction is made a question,—*Fitzhugh v. Castor* 4 Tex., 391. We cannot correct any error made by the Supreme Court of the State of New York, but when a judgment rendered there is made the basis of an action here, we are bound, when the proper issue is made, to inquire whether the Court had authority to render the judgment. If we find that it had jurisdiction at the commencement of the proceedings, but before the judgment was rendered that jurisdiction ended, we must regard the judgment as nugatory. The acts of Congress, for the removal of causes, from that of 1789 to 1867, are substantially alike in this particular, that the right to remove is conferred directly upon the party, or parties who were within the statutes, and who comply with its terms. It is a privilege conferred directly by the act of Congress, and is a matter of right, and whenever an application is made for the removal of a cause, and it is shown to be one embraced by the act, and that the defendant has complied with the required conditions, it is the duty of the State Court to proceed no further in the suit. All other proceedings are *coram non judice*, and, of course, nugatory. *Gordon v. Songest*, 16 Peters, 97; *Fisk v. Union Pacific Railroad and others*, 6 Black., 362; *Conkling's Treaties*, 173. The intention of all the acts of Congress is the same; to secure a removal, on compliance with the particular statute under which the application is made, without making the right depend upon the mere pleasure, or will of the State Court, in any manner whatever. Undoubtedly there is a large discretion to be exercised by the State Court in respect to the sufficiency of the application and of the surety. If the Court to which the application is directed, and the surety offered abuses this discretion, and refuses the removal in a case wherein the exercise of a sound legal discretion would require the removal to be granted, its further proceedings in

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the cause is squarely forbid by the act of Congress, and a judgment thereafter rendered in that Court would be without authority, and void. *Fisk v. The Union Pacific Railroad*. We believe it to be within the province of any Court wherein such a judgment is sought to be made the foundation of an action, to inquire whether the Court rendering the judgment abused its legal discretion, and thereby wrongfully asserted jurisdiction, and proceeded in the cause after its jurisdiction was clearly at an end. The application made in the Supreme Court of the State of New York, was based upon the act of Congress of July 17, 1866, as amended by the Act of March 2, 1867. 14 *Statutes at Large*, pages 306 and 558. The act requires the applicant for removal to "file a petition in such State Court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for her entering in such Court on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts," &c.

In all the adjudicated cases arising under the acts of Congress, giving the right to remove causes from State Courts, the applicant has been held to a strict, or reasonably strict, compliance with the Statutes. Several objections were made in argument to the sufficiency of the application made in this cause, the first that it was too late to make the application after the cause was referred for trial. The act of Congress says the petition may be filed at any time before the final hearing, or trial of the suit. There is nothing in the record to show that the cause had been finally heard by the referee before the petition was filed, and even if it had been heard, and report made, we are of the opinion that it was not too late. We believe, in respect to the next objection urged, that the petition sufficiently shows that it was made

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to transfer the cause to the next term of the United States Circuit Court for the Southern District of New York. Although it appears that the bondsmen were not residents of the State of New York, but resided in the adjoining State of New Jersey, they justify by showing that they owned real estate within the jurisdiction of the Court of New York, ample for security, and hence we think the Court was not authorized to reject the security on account of their non-residence. We are of opinion that the affidavit filed with the petition was insufficient. The last objection is that the condition of the bond offered is not in accordance with the act of Congress. The bond and surety offered, which is made a part of the several paragraphs of answer, is in the following language. "The condition of the above obligation is such that if the said Indianapolis, Bloomington and Western Railroad Company enter in said Circuit Court, on the first day of its session, copies of the process against them in said cause, and shall also there appear, and enter special bail in the cause, if special bail was originally required therein, according to the law and practice of the United States and its Courts, then these presents and obligations shall be void, otherwise to remain in force."

Under the first act of Congress, passed in 1789, the only surety required was that the defendant would appear in the United States Court, and enter a copy of the process against him, and give special bail, if special bail was originally required. Under this act it was necessary for the plaintiff in the cause to follow it up, and file in the United States Court a new complaint. This was changed by the act of 1866 and 1867, before cited, and the defendant is by these late acts required to secure the filing in the United States Court, not only a copy of the process against him, but copies of pleadings, depositions, testimony, and other proceedings in said suit. These provisions now enable the plaintiff to

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follow the cause into the United States Court without trouble or additional expense to himself. This is secured to him by the Statutes, and is so reasonable a provision that we cannot regard it as a mere formality required to be inserted in the undertaking, but as of the substance of the surety to be offered. The plaintiff having chosen his forum and brought his suit in a court having jurisdiction of the parties, and of the subject matter, ought not to be driven into another tribunal at great expense, and trouble on account of a privilege given the defendant. It would seem that the bond tendered may have been copied from a form given under the act of 1789 and it may be unfortunate for the defendant that greater care and skill was not manifested by her attorneys in the State of New York. It is urged by the defendants that as no objections to the sufficiency of the bond appear by the record to have been pointed out, we cannot now find that it is insufficient, for if the objection had been made at the proper time it might have been perfected. It is a sufficient answer to say, that the reason for a ruling made by a Court does not appear upon the record, and we do not know from the record, that the Supreme Court of New York overruled the motion for the transfer of the cause on account of the defect in the condition of the bond we have just pointed out. We are of opinion, however, that the defect was sufficient to authorize the Court to retain the cause until sufficient surety was given for the filing, in the United States Court, of copies of all the pleadings, depositions, testimony, and other proceedings in said suit, and as we are bound to presume in favor of the right action of a Court, nothing appearing of record to the contrary, we may presume that the same objection to the bond was raised in the Supreme Court of New York, and that it was there held, as we now hold, that it was insufficient. The defendant says in her answer that the bond exhibited to us, and made a part of the answer is the

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same offered to the Court in New York. We have no evidence, or allegations even, that any other was offered, or would have been offered, if the defect had been pointed out. We are of opinion, therefore, that the surety offered did not comply with the act of Congress under which the removal was sought, and that its defect was such, that the Court might, in the exercise of a sound legal discretion, refuse to accept it, and until sufficient surety was offered that the act of Congress should be complied with, the Court was authorized to retain jurisdiction of the cause, and proceed therein. The rulings of the Court at Special Term, on the demurrers, were therefore right.

Judgment affirmed.



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- Held:* That the parties must be presumed to have contracted with reference to the older lien, and where there is nothing to show that the mortgagees attempted to hold a lien for more than might be justly due them, or that the mortgagor ever attempted to derive any benefit from the right to sell the real estate, or to show that either mortgagor or mortgagees attempted, or intended that the proceeds, if any of the real estate had been sold, should be applied to any other purpose than the payment of the mortgage debts, the mortgage can not be held fraudulent by reason of the clause in reference to the sale of the mortgaged property.....558
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